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CASES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 216

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

THE P. KOENIG COAL COMPANY

No. 217

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

MICHIGAN PORTLAND CEMENT COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES

OPINION

The opinion of District Judge Tuttle in No. 216 is reported as *United States* v. *P. Koenig Coal Co.*, 1 Fed. Rep. (2d) 738.[1]

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[1] In No. 217 the opinion of the District Court in No. 216 was adopted as controlling (No. 217, p. 42).

JURISDICTION

In each case the District Court, on September 22, 1924, sustained a demurrer to the indictment (No. 216, p. 54; No. 217, p. 42). The Government, on October 18, 1924 (R. 217, 57; R. 217, 46), prosecuted writs of error under Act of March 2, 1907, c. 2564, 34 Stat. 1246, which provides that a writ of error from the District Court may be taken directly to this Court, " From a decision or judgment quashing, setting aside, or *sustaining a demurrer to* any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." The District Court so construed the Elkins Act as to exclude from the provisions thereof the concessions charged (R. 216, 52).

QUESTION

The question is whether Section 1 of the Elkins Act of February 19, 1903 (Ch. 708, 32 Stat. 847), as amended by Section 2 of the Hepburn Act of June 29, 1906 (Ch. 3591, 34 Stat. 587), condemns and punishes a shipper for knowingly accepting and receiving concessions from carriers in respect to the transportation of property in interstate commerce, which concessions he obtained because of the false, fraudulent, and deceitful representations which he made to the carriers and on which the carriers innocently and in good faith relied.

STATEMENT

No. 216

The P. Koenig Coal Company, Detroit, a Michigan corporation, stands indicted on 18 counts covering as many carloads of coal. All of the 18 shipments originated in West Virginia and moved to Detroit in August, 1922. Chesapeake & Ohio was the initial carrier for each car.

Count 1 charges that, on July 25, 1922, the Interstate Commerce Commission was of opinion that an emergency requiring immediate action then existed upon all of the railroad lines lying east of the Mississippi River. Acting under its authority, on that day the Commission promulgated Service Order No. 23, and suspended, from and after July 26, 1922, all of the rules, regulations, and practices with respect to car service which conflicted with the directions of Service Order No. 23. By that order it was provided that each carrier, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line, should give preference and priority to the movement of certain commodities, among which was coal. In supplying cars to mines upon the lines of any coal-loading carrier—that is, a carrier serving coal mines located upon its own line—such carrier should place at, furnish with, and assign to such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of

classes indicated by their numbers, Class I being for such purposes as might from time to time be specially designated by the Commission or its agents. The carriers should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of hospitals, which were placed in Class 2, over such placement and assignment of cars for the loading of coal required for the manufacturing of automobiles or automobile parts, which were then placed in Class 5, but later, by an amendment to Service Order No. 23, effective August 30, 1922, in Class 3.

Coal shipped and consigned for the current use of hospitals should not be reconsigned or diverted for such manufacturing purposes. Service Order No. 23 and the amendment remained in full force and effect from July 26 to September 20, 1922. There was in fact during all of that time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of Chesapeake & Ohio Railway, resulting from strikes and nonaction of employees whose duty it was to keep such equipment in repair and in a serviceable condition, as that the Company was currently unable promptly to transport all freight offered to it for movement or to be moved over its lines. Although Chesapeake & Ohio was able to place at, furnish with, and assign to coal mines upon its lines cars suitable for loading and trans-

portation of a portion of the coal required for the current use of hospitals and for the current use of other consumers of coal in the same class with hospitals, i. e., Class 2, 78 per cent thereof, it was then unable to place at, furnish with, or assign to coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for the manufacture of automobiles or parts thereof, or any suitable cars whatever for Class 3 or Class 5, or for any purpose except Class 1 and Class 2.

Count 1 further charges that on August 31, 1922, appellee, a corporation coal dealer, well knowing the premises, " unlawfully did knowingly accept and receive a certain concession " in respect to the transportation of certain property whereby an advantage was given to the appellee " and a discrimination was practiced in its favor and against all other such coal dealers," and " all shippers desirous of shipping coal embraced in Classes 3 and 5 from mines located on the line of Chesapeake & Ohio."

Count 1 further charges that on August 2, 1922, " and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal which it was not then lawfully entitled to receive," and intending to procure for the concern named the transportation of the coal from West Virginia to Detroit, for the use of that concern in the manufacture of automobiles and parts

thereof, and to divert and deliver the same to that concern, appellee adopted this device: on that day appellee by sending from Detroit to Monitor Coal & Coke Company, Huntington, W. Va., a telegraphic order for coal, which purported to be an order for the shipments of five carloads of coal to the Samaritan Hospital, Detroit, in care of appellee, and to be delivered there to appellee upon its sidetrack connecting with the line of Grand Trunk Railway, for the use of Samaritan Hospital, induced the placing, furnishing, and assigning, by Chesapeake & Ohio, on August 5, 1922, at request of the Monitor Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its line in West Virginia, C. & O., car 60260, at Monitor Mine, No. 2, at Logan, the loading of the car with 96,700 pounds of coal, the tendering by Monitor Company to Chesapeake & Ohio for transportation of the loaded car, billed and consigned in accordance with the telegraphic order, the transportation thereof from Logan to Detroit, in accordance with the billing, and its delivery there, on August 31, 1922, to appellee, upon the Grand Trunk siding, which delivery appellee then and there accepted; " and which said device then and there was a deceptive device because none of said carriers than (then) had any knowledge of said intentions " of said appellee.[2]

[2] The car moved over Chesapeake & Ohio, D., T. & I., Wabash, and Grand Trunk.

Count 1 further charges that appellee, in pursuance of its said intentions and as a final step in a device for securing the unlawful concession, immediately upon the receipt and acceptance by it of the coal at Detroit, diverted and delivered the same in the car to Dodge Brothers, automobile manufacturers, who used the coal; the Samaritan Hospital did not need or require the coal, and had not authorized or requested appellee to use its name for appellee, Dodge Brothers, or any consumer whatever.

Count 1 further charges that appellee "by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property * * * obtained by deception practiced by it upon said carriers, whereby an advantage was given by those carriers" to appellee, which, by the force of Service Order No. 23, as appellee well knew, was not then open or due to it, and which the said carriers, "but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others."

The form and substance of each count are in all respects the same. In 3 counts the name of Samaritan Hospital was used. In 1 count the name of Providence Hospital was used. In 11 counts the name of St. Mary's Hospital was used. In 2 counts the name of Detroit Creamery Company was used. In 1 count the name of Towars Creamery was used.

In 8 counts Logan was the point of origin, in 4 counts Yolyn, in 4 counts Lundale, and in 2 counts Dabney.

In 4 counts the coal was shipped by Monitor Coal & Coke Company, in 4 counts by Yuma Coal & Coke Company, in 4 counts by Argyle Coal Company, in 4 counts by Lundale Coal Company and in 2 counts by Thurmond Coal Company.

In 15 counts Dodge Brothers were the ultimate consumers and used the coal in the manufacture of automobiles. Fisher Body Corporation, manufacturers of automobile bodies, used the remaining 3.

No. 217

Michigan Portland Cement Company, a Michigan corporation, stands indicted on 15 counts covering as many carloads of coal. All of the 15 shipments originated in Kentucky, and moved to "Four Mile Lake," a point in Michigan, in August and September, 1922. Louisville & Nashville Railroad was the initial carrier.

The facts alleged in this indictment, which constitute the gravamen of the offense and the deceptive device used by the appellee in obtaining the concessions in transportation, are set out in detail therein, and are quite similar to the facts and the deceptive device alleged in No. 216.

Count 1 charges the promulgation of Service Order No. 23 by the Commission, the contents thereof, and the order of priority in which the coal cars should be placed at, and assigned to, the coal mines

by the coal loading carriers. Coal required for Class 2 purposes included, among other things, coal required for the current use of public utilities which directly served the general public, under a franchise therefor, with street and interurban railways, electric power and light, gas, water and sewer works. Coal required for Class 5 purposes (later designated Class 3) included coal required for the purpose of manufacturing of Portland cement. Coal consigned for a purpose in Class 2 should not be reconsigned or diverted except for some other purpose in Class 2, or for a purpose in Class 1.

During the emergency period indicated, Louisville & Nashville Railroad, on account of the strikes and shortage of equipment, was able to place and assign to coal mines upon its lines only 50 per cent of the coal cars required for Class 1 and Class 2 purposes, and it was unable to place and assign to such mines any coal cars for the loading and transportation of coal required for purposes in Class 3, Class 4, and Class 5.

Count 1 further charges that Michigan Portland Cement Company, during the period indicated, was engaged in the manufacture of Portland cement, and customarily accepted delivery of carload shipments from the Michigan Central Railroad Company, at and upon certain railway tracks or private sidings owned by Michigan Portland Cement Company, which connected with the railway line of Michigan Central, the private siding and connection then being at "Four Mile Lake."

Count 1 further charges in particularity the request made by the Wilson-Berger Coal Company upon the Louisville & Nashville for 29 coal cars to be placed on August 11, 1922, at its Coburn mine, at Coburn, Ky., for the loading and transportation of coal for Class 2 purposes, the placement and assignment of 9 specific coal cars at that mine on that date, and the loading with bituminous coal of each of those cars.

Count 1 further charges that on September 4, 1922, appellee, then and before then well knowing the premises, at Four Mile Lake " unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain of said property in interstate commerce" by Louisville & Nashville, Cleveland, Cincinnati, Chicago & St. Louis Railway, Cincinnati Northern, and Michigan Central Companies, "whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in Classes 3 and 5."

Count 1 further charges that on August 23, 1922, appellee, with the assistance of Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in car number " 28108," from the Central Fuel Company; and, on August 23, 1922, then intending by a device to procure Class 2 preference and priority in the

placement and assignment of coal cars for the loading and transportation of coal to be used for the purpose of manufacturing of Portland cement, and intending to procure the transportation of that carload of coal in interstate commerce for the use by it in the manufacturing of Portland cement, knowingly directed the Bewley-Darst and the Central Fuel companies to tender all of such coal for transportation, billed and consigned to "Municipal Light and Power Company, Four Mile Lake, Michigan Central delivery." Pursuant to and by reason of those instructions Louisville & Nashville so billed the car of coal and transported it accordingly. On September 4, 1922, pursuant to the instructions and billing and a further instruction given by appellee to the Michigan Central that the car of coal be delivered to appellee upon its private siding, the carload of coal was delivered to appellee on its private siding at Four Mile Lake instead of at the Municipal Light and Power plant owned by the municipality of Chelsea nearby. The appellee knowingly accepted delivery of the carload of coal upon its private siding and used the coal for the purpose of manufacturing Portland cement.

Count 1 further charges that at the times of the giving by appellee of the shipping instructions to Bewley-Darst Coal Company and Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using the carload of coal

for the purpose of manufacturing Portland cement, appellee then well knew the municipality of Chelsea did not need or require the carload of coal, and had not authorized or requested appellee to procure or provide any coal for it whatsoever.

Count 1 further charges that appellee " by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property * * * obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers," to appellee, which, by the force of Service Order No. 23, as appellee well knew, was not then due or open to it, and which the carriers " but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others."

In each of the 15 counts the car moved over Louisville & Nashville, Cleveland, Cincinnati, Chicago & St. Louis, Cincinnati Northern, and Michigan Central railroads. Thirteen cars were consigned to the Municipal Light and Power Company, Four Mile Lake (R. 7), and 2 cars to City Electric Light and Power Company, Four Mile Lake. The municipality of Chelsea owns and operates an electric light and power plant near Four Mile Lake (R. 7). Nine cars were loaded at the Coburn mine, Coburn, Ky., 4 cars were loaded at the Merna mine, Merna, Ky., and 2 cars were

loaded at the Storm King mine Storm King, Ky. In all of the counts Michigan Portland Cement Company was the real consignee which consumed the coal.

PROCEEDINGS IN THE DISTRICT COURT

To each indictment a demurrer was interposed on substantially the following grounds (No. 216, 48; No. 217, 40).

1. The facts charged do not constitute a concession under the Elkins Act.

2. Service Order No. 23 was beyond the power of the Commission as an attempted exercise of legislative power.

3. Service Order No. 23 was even beyond the power of Congress to enact.

4. Service Order No. 23 prefers Lake Superior ports.

5. Service Order No. 23 violates the Fifth Amendment because it deprives the appellee (No. 216) " of his trade custom and profits ".

6. Service Order No. 23 was unauthorized as the Commission may not make such rules, regulations, and practices binding upon and applicable to a shipper.

The learned District Court sustained the demurrers (No. 216, 54; No. 217, 42) on the sole ground that no offense was charged under the Elkins Act as amended. The Court expressly construed the statute in the following words: " I reach the conclusion that it can not properly be so

extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar " (R. 216, 54).

The basis of the ruling is thus stated (No. 216, 53): " If an advantage obtained by such artifice and fraud be a concession accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the ' bumpers ' of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession ' given ' him, though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same."

ERRORS ASSIGNED

Errors were then assigned in each case and the writs prosecuted. Summarized, the errors relate to the action of the District Court—

1. In so construing the statute as to exclude therefrom the offense charged.

2. In accepting the language and illustrations which the District Court adopted as the basis for its opinion.

3. In holding the facts charged did not constitute a concession under the Elkins Act as amended as that act was construed by the Court.

4. In sustaining the demurrers.

THE STATUTE.[3] (Ch. 3591, 34 Stat. 584)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

* * * * *

"Section 2. * * *

" That section one of the Act entitled 'An Act to further regulate commerce with foreign nations and among the states,' approved February nine-

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[3] The text of the pertinent provisions of the Act of February 19, 1903, is as follows (Ch. 708, 32 Stat. 847):

"Chap. 708.—An Act To further regulate commerce with foreign nations and among the States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. * * *."

teenth, nineteen hundred and three, be amended so as to read as follows:

* * * * *

and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *." (Ch. 3591, 34 Stat. 587, 588.) (Approved June 29, 1906.)

ARGUMENT

SUMMARY

I. All questions of constitutional law and lack of power in the Commission attempted to be raised by the demurrers have gone over the dam (*Avent* v. *United States,* 266 U. S. 127, 130).

II. The only question saved to appellees is the construction of the Elkins Act.

III. The purpose of the act was " to cut up by the roots every form of discrimination, favoritism, and inequality " (*Louisville & Nashville* v. *Mottley,* 219 U. S. 467, 478), and " to require equal treatment of all shippers and prohibit unjust discrimination in favor of any of them," and " to prevent favoritism by any means or device whatsoever " (*United States* v. *Union Stock Yard,* 226 U. S. 286, 307, 309). " The Elkins Act proceeded upon broad lines * * * " (*Armour Packing Co.* v. *United States,* 209 U. S. 56, 72).

IV. The deception practiced upon the carriers by the false and fraudulent device enabled the appellees to obtain the unlawful concessions. No fine distinctions sought to be drawn between acquisition of those concessions by trickery and deception on the part of the shipper, and the action of carriers in knowingly granting them, will save the appellees from the penalties of the statute (*United States* v. *Metropolitan Lumber Co.,* 254 Fed. Rep. 335; *United States* v. *Vacuum Oil Co.,* 153 Fed. Rep. 598).

V. Coal is a national necessity. Its diversion from Class 2 (hospitals) to Class 5 (" trade custom and profits ") through trickery and deception by a false and fraudulent device to obtain railway transportation may not be cast aside as in the simile with the hobo on the bumpers who steals a ride or a thief who picks the pocket of the conductor. Acquiring transportation of coal in carloads or trainloads in times of emergency or possible calamity by trickery may not be dealt with on the same basis even though morally all of the transactions stand on the same footing.

VI. If Service Order No. 23 is not protected by the Elkins Act as amended and there is no law by which punishment may be dealt to these appellees, then all service orders issued by the Commission will become instrumentalities destructive of the common good, for they at once will be used by the dishonest through trickery and deception to divert the coal from the classes ordered by the Commission to " his trade custom and profits." In short, the order may be used to destroy that which it was designed to maintain.

VII. If the appellees may not be reached and punished under the Elkins Act, the statute which provides for relief in times of emergency and all service orders issued in pursuance thereof become at once practically useless as there is no other statute under which the Government may proceed (*United States* v. *Metropolitan Lumber Co.*, 254 Fed. Rep. 335).

I

AS TO ALL QUESTIONS OF CONSTITUTIONAL LAW AND LACK OF POWER IN THE COMMISSION, SERVICE ORDER NO. 23 [4] HAS ALREADY BEEN SUSTAINED

In the summer of 1922 the strikes of the United Mine Workers in the bituminous fields and of the Federated Shop Crafts of the railways were threatening to engulf the Nation in a national calamity (*United States* v. *Railway Employees,* 283 Fed. Rep. 479; 286 Fed. Rep. 228; 290 Fed. Rep. 978).

Service Order No. 23 was promulgated on July 25, 1922, because the Commission was of opinion that an emergency requiring immediate action then existed upon the lines of the railroads operating east of the Mississippi River. The carriers were directed to give preference and priority to the movement of food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil; that in the supply of cars to coal mines carriers were directed to place, furnish, and assign cars to mines suitable for loading and transportation of coal in succession as might be required for the following classes of purposes and in the following order of classes, viz: Class 1, such special purposes as may be specially designated by the Commission. Class 2, fuel for (a) railroads, ships, and vessels; (b) public utilities, including street and interurban railways, electric power and light, gas, water and sewers; (c) United States, State and municipal governments, hospi-

[4] Appendix A.

tals, schools, and other public institutions. Class 3, bituminous coal consigned to any Lake Erie ports for transshipment by water to ports upon Lake Superior. Class 4, commercial sizes of coal for domestic use. Class 5, other purposes.

Order No. 23 further provided that no coal embraced in Classes 1, 2, 3, or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or in a superior class in the order of priority prescribed.

In *Avent* v. *United States,* 266 U. S. 127, 130, this Court, on a writ of error invo'ving facts in all respects similar, and citing numerous cases, said, with respect to Service Order No. 23, (a) " That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried, consistently with the Fifth Amendment, is clear and is assumed," (b) " That it can do so without trenching upon the powers reserved to the States seems to us not to need argument," (c) " That it can give the powers here given to the Commission, if that question is open here, no longer admits of dispute," (d) " The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed," (e) " Congress may make violation of the Commission's rules a crime," and (f) " The alleged preference of ports if there is

anything in the objection does not concern the plaintiff in error."

II

THE CONCESSION OBTAINED BY THE DEVICE ADOPTED IS PROHIBITED BY THE ELKINS ACT

Through the device used the appellees knowingly received the concession. There can be no question about that. Was the concession so received prohibited by the statute?

(A) THE ELKINS ACT

The all-embracing provisions make it unlawful for—

a, any person, persons, or corporation
b, to offer, grant, or give,
c, or to solicit, accept or *receive*
d, any rebate, concession, or discrimination in respect to the transportation of any property * * *
e, whereby any such property shall *by any device whatever* be transported at a less rate * * *,
f, or whereby any other advantage is given or discrimination is practiced—

and—

a, Every person or corporation, whether carrier or shipper, who shall,
b, knowingly,
c, offer, grant, or give,
d, or solicit, accept, or receive
e, any such rebates, concession, or discrimination
f, shall be deemed guilty, etc.

" On demurrer all the averments in the count are to be taken as true, and it is not easy to see wherein they are defective," said Circuit Judge McPherson in *Knoell* v. *United States,* 239 Fed. Rep. 16, 19 (C. C. A.). The learned District Judge said in the instant case (1 Fed Rep. (2d) 740), " It cannot be doubted that the conduct of which the defendant is here accused was, if indulged in, most reprehensible and deserving of severe condemnation. The sole question, however, with which this court is now concerned is whether such conduct constitutes the acceptance or receipt of a ' concession ' from a common carrier railroad, as denounced by the statute invoked by the government " (R. 216, 52).

Under the plain provisions of the statute invoked in the indictment the forbidden " concession " is *any* concession in respect to the transportation of any property in interstate commerce whereby *any* advantage is given to one shipper to the prejudice or disadvantage of another shipper, *or* whereby *any* discrimination is practiced to the advantage of one shipper and the disadvantage of another shipper.

The provisions of the statute are stated in the disjunctive. The pertinent words are " offer, grant or give; *or* solicit, accept or receive." There is no express provision which makes the knowledge or connivance of the carrier an element of the offense. Under the wording of the statute, if a

shipper "receives" a "concession" "whereby any other advantage is given *or* a discrimination is practiced," he violates the statute. The statute does not use the conjunction "and". If it did, then a violation of the act would require both a conscious giving of the concession on the part of the carriers *and* a conscious receipt of the concession on the part of the shipper. The use of the disjunctive "or" makes either the carrier or shipper liable under the statute without the conscious participation in the condemned practice on the part of the other.

The Government maintains the words are susceptible of this construction: it shall be unlawful for any corporation knowingly to receive any concession in respect to the transportation of any property whereby any such property shall by any device whatever be transported at a less rate * * * or whereby any other advantage is given or discrimination is practiced.

(B) THE SCOPE OF THE ELKINS ACT

The Elkins Act is a remedial statute entitled to that interpretation which reasonably accomplishes the great purpose which it was enacted to subserve and an interpretation that is not so narrow as to defeat the obvious intention of Congress (*Logan* v. *Davis,* 233 U. S. 613, 628; *United States* v. *Lacher,* 134 U. S. 624, 628; *United States* v. *Martin,* 176 Fed. Rep. 110, 113).

The interpretation of the District Court is too narrow. Assume that a carrier, in the distribution of coal cars, favored shipper A to the prejudice of shipper B. Of course, it could not be shown that the carrier and shipper A consciously joined or participated in the discrimination. Under the interpretation of the District Court, no prosecution of the carrier could be instituted under the Elkins Act because the favored shipper did not consciously participate with the carrier in inflicting the injury. Similar argument may be made in respect of rebates and concessions.

The intention of the Congress to enact a statute which would outline offenses of shippers, distinct from offenses of carriers, is reflected in the report of the House Committee on Interstate and Foreign Commerce, February 12, 1903, on Senate Bill No. 7053, which, as amended, became the Elkins Act. Chairman Knapp of the Interstate Commerce Commission is quoted in that report as follows (Rep. 3765, 57 Cong. 2d Session):

> I want two things: I want the corporation carrier made liable and I want the shipper made liable when he accepts a preference or secret rate whether there is discrimination or not.

From 1887, when Congress first enacted the Act to regulate commerce until it enacted the Elkins Act in February, 1903, the Congress had repeatedly amended the criminal provisions of the Act to regulate commerce with purpose to prohibit all re-

bates, concessions, and discriminations in connection with railroad transportation service. As indicating that a narrow interpretation of the meaning of the Elkins Act is not in consonance with the intention of the Congress, the following statements are further quoted from the Committee report:

> The first and second propositions above referred to practically exhaust the power of legislation to prevent rebates and discriminations through criminal prosecutions.
>
> * * * * *
>
> Your Committee believes that the legislation proposes by the Elkins Bill, together with the present interstate commerce law, covers about all the ways that thought or language can devise or describe to prevent the granting of discriminations in favor of one shipper as against another, or the building up of one concern through the favoritism of railroad corporations.

(C) THE DECISIONS OF THE COURTS

The courts have repeatedly pointed out that interpretations of the meaning of the Elkins Act should reflect the broad purposes of that statute. *United States* v. *New York, New Haven & Hartford,* 153 Fed. Rep. 630, 633:

> Moreover, this provision of the statute (section 1, Elkins Act) should receive a construction in harmony with the spirit of the Act, and, though ordinarily a statute which imposed a penalty, is not strictly construed against a defendant, yet, where the manifest

purpose of the statute is remedial, the object of the legislature in enacting the same is the important consideration. .

New York, New Haven & Hartford v. *Commission,* 200 U. S. 361, 391:

> It can not be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

Armour Packing Co. v. *United States,* 209 U. S. 56, 72:

> The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished but the intention was to prohibit any and all

> means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

United States v. *Union Stock Yard,* 226 U. S. 286, 309

> It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract.

See also—

Chicago & Alton v. *Kirby,* 225 U. S. 155, 165.

Louisville & Nashville v. *Mottley,* 219 U. S. 467.

Vandalia Railway v. *United States,* 226 Fed. Rep. 713.

Northern Central Railway v. *United States,* 241 Fed. Rep. 25.

(D) CONCERTED OR COLLUSIVE ACTION OF SHIPPER AND CARRIER UNNECESSARY

Appellees contend that the shipper can not accept or receive a concession, discrimination or advantage unless the carrier knowingly grants or gives the same. The contention is that the Elkins Act is applicable only when carrier and shipper are acting in collusion and in concert. Under that opinion no violation of section 1 of the Elkins Act by a common carrier or a shipper can be estab-

lished in the absence of proof that each of them, voluntarily, consciously, and knowingly concurred and participated in the prohibited acts and conduct of the other.

This interpretation of a criminal statute given by the District Court which has the effect of imposing such a double burden of proof upon the Government, without express authority, is not consistent with any interpretation of criminal statutes which has come to our attention.

That interpretation casts a heavy burden of averment and proof on the Government. In the prosecution of either a common carrier or a shipper by indictment under that section, the Government must allege and prove that the offense was knowingly and consciously committed by the defendant and also by another. It must prove conspiracy. Such a contention is grossly unsound and such an interpretation would defeat the very purpose of the Elkins Act " to cut up by the roots every form of discrimination, favoritism and inequality." Is it logical that Congress intended to permit a shipper to be immune to prosecution if he were clever enough to obtain and receive a discrimination or advantage in transportation by practicing deception or subterfuge on the carrier? Is not the injury and injustice to the public and to the shippers' competitors equally as vicious when the concession is obtained *without* the knowledge of the carrier as it is when the carrier and shipper connive? Is it

not the secret and underhanded advantages in transportation to any shipper that the Elkins Act intends to, and does denounce and prohibit. Are shippers placed on an equal basis when they are allowed to obtain discriminations or advantages in transportation unbeknown to the carrier? Is it plausible that Congress intended to permit the shipper to obtain an advantage by stealth and fraud, which advantage the shipper was prohibited from receiving from the carrier knowingly?

If the construction by the learned District Court is sound, then not only the shipper who perpetrates the fraud and deception without knowledge on the part of the carrier may go with impunity, but likewise the carrier, its officers and agents, may also knowingly grant concessions unknown to the shipper and go with impunity.

The law may not be construed one way for the shipper who practices deception and obtains the concession without knowledge on the part of the carrier, and another way for the carrier who grants concessions without knowledge on the part of the shipper.

It is conceivable, if the Elkins Act shall be construed as claimed by the appellees, that carriers may grant secret concessions without any knowledge whatever on the part of the shipper; thus, certain preferred shippers may be furnished with better cars, better road service, expedition in switching and terminal handling, and better motive power.

Under the construction of the District Court, a concession may with impunity to the carrier knowingly be granted to a shipper and unknowingly received by the latter even though the officer of the carrier who authorized the concession may be part owner of the shipper's business.

Under that construction of section 1 of the Elkins Act the Government cannot institute prosecutions under any Federal statute for the following possible abuses:

(*a*) When in time of emergency the Interstate Commerce Commission, in the public interest, by order requires common carriers temporarily to withdraw part of their service from manufacturers in order that those carriers may furnish adequate service for the transportation of necessities of life, such order may be virtually nullified by shippers who employ deception or misrepresentation, without the knowledge or connivance of carriers, of the kind challenged in the indictment.

(*b*) The distribution of coal cars to virtually all coal mines in the United States is based upon mine ratings computed from information disclosed in affidavits of the coal mine operators. Misrepresentations made through those affidavits, without the knowledge or connivance of carriers, can and may produce widespread discrimination in the distribution of coal cars.

(c) Breaking through or violating of embargoes placed by carriers on either commodities or

localities, or both, by deception practiced by the shipper. Service Order No. 23 does not differ materially from embargoes and under the ruling of the District Court either may be flouted with impunity.

It was not until after the Transportation Act of 1920 was approved, that the Commission issued service orders such as No. 23.[5] While the indictment in the case at bar is the second to come before this Court (*Avent* v. *United States*, 266 U. S. 127), the construction claimed by the Government for the Elkins Act is not new.

In *Missouri, Kansas & Texas Railway* v. *Harriman*, 227 U. S. 657, 671, this Court considered the validity under the Carmack Amendment of a contract for an interstate shipment of livestock. The freight rate was dependent upon the value of the livestock and the concession and discrimination was *knowingly* obtained by the shipper but *not knowingly* granted by the carrier. The Court held that such facts would constitute a violation of the Elkins Act, in the following language by Mr. Justice Lurton:

> When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice,

[5]Appendix B consists of a list of all service orders issued by the Commission since the Transportation Act was approved.

> for the valuation automatically determines which of the rates is the lawful rate. *If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903* (32 Stat. 847, c. 708). *Texas & P. Railway* v. *Mugg,* 202 U. S. 242; *Chicago & A. Railway* v. *Kirby,* 225 U. S. 155. The particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped (italics ours).

United States v. *Vacuum Oil Co.,* 153 Fed. Rep. 598, 602, 604. Demurrer to indictment of shipper under Elkins Act for receiving concessions from published tariff rate. In holding that " The evil sought to be remedied must always be considered, and in the Act to regulate commerce the desideratum was the eradication of such evil practices as resulted in the carriage interstate of goods belonging to powerful interests or industries to the detriment of less favored shippers," District Judge Hazel said:

> It will be observed that the proposition with which we are here concerned is not whether the defendants have been benefited by an unjust discrimination as against other shippers over the same route, but have the defendants been given a concession from the

> published tariff rate, a rate of which the public is presumed to have knowledge and upon which other shippers of petroleum have a right to place reliance. The word " concession " does not appear in the earlier acts to regulate commerce, but is used for the first time in section 1 of the Elkins Act, which is apparently a " catchall " provision for any practice *by either carrier or shipper* which by any device whatever would tend to defeat the purpose of the law. The term " concession " does not necessarily imply that the shipper solicited a concession or privilege which the carrier could give. The statute is clearly violated if the defendant has accepted or received any concession or discrimination which resulted in the carriage of the freight in question at a less rate than that established under the act (italics ours).

In *United States* v. *Hocking Valley Railway,* 194 Fed. Rep. 234, 247, 257 (affirmed C. C. A. 210 Fed. Rep. 735), Judge Killitts, in overruling the demurrer to the indictment which alleged that the acceptance of notes in payment of freight charges was an extension of credit in violation of Section 6 of the Interstate Commerce Act and of Section 1 of the Elkins Act, said:

> The court in construing a statute is not called upon to refine its words to an extreme nicety of thought, nor to apply microscopic distinctions in the meanings of words. The analysis of neither a criminal statute nor an indictment thereunder is an excursion in

dialectics. The underlying purpose of the statute is to be observed in construing its words and phrases, which are to be given their ordinary acceptation, unless the latter is clearly modified by usage or definition peculiar to the statute; and the attempt to predicate on the facts alleged an offense is to be considered reasonably by applying those inferences and conclusions which apparently flow naturally from such facts, and which appeal to men of average intelligence as the proper deductions therefrom. The time for keenly analytical reasoning in an effort to discover, in either a statute or an indictment, loopholes of escape by engaging in finely spun discriminations of meaning or by offering turns of thought of which the language is found capable only after deep cogitation disappeared in criminal practice with the passing of the extreme punishments anciently visited on slight offenses.

* * * * *

Of course, it is not practicable for Congress to set a limit on human ingenuity in the devising of schemes obnoxious to the act to regulate commerce by attempting a description of all possible methods. The act accomplishes its end by directly and unmistakably condemning results, wherefore every devisable plan to produce the objectionable conditions is under its ban. Surely our jurisprudence is not so inept and feeble that a statute exhibiting a definite purpose to meet palpable mischiefs must be con-

strued so narrowly as to oblige Congress from time to time to amend it that its provisions may be kept, at the best, only in the immediate rear of a procession of new methods born of the fertility of human invention and designed to circumvent that legislative will which it attempts by each amplifying amendment to express.

In *United States* v. *Metropolitan Lumber Co.*, 254 Fed. Rep. 335, 338, 341, 342, the opinion of District Judge Haight is *on all fours*. The indictments were under the Elkins Act. Under authority of the Director General, and on direction of the Regional Director, Pennsylvania Railroad, because of weather conditions, laid an embargo against the transportation of property, including lumber, not constituting war supplies specifically approved by the War Department. Defendant was engaged in purchasing, shipping and selling lumber. In order to deceive the carriers, defendant, notwithstanding the embargo, caused the lumber to be consigned to "Ira R. Crouse, in care of United States Government Quartermaster, Government order," etc., at Perth Amboy. Believing the lumber to be for Government use, the carrier transported the same as not prohibited by the embargo, although the shipper who practiced the deception knew that the lumber was not war supplies or other property exempted from the operation of the embargo. The defendant was indicted for receiving a discrimination or concession. In overruling demurrers, and

after an exhaustive review of the statutes and prior cases, the learned District Judge said:

> Finally, in the development of the legislative object the Elkins Act was passed, which, by its language, seems to be all-embracing, and to cover the loopholes which the previous acts left open for discrimination and the exercise of favoritism. It also brought within the prohibition of the law many acts of the shipper which had not theretofore been criminal; thus making the law more effective to accomplish the object sought.
>
> It needs no argument to demonstrate that there is fully as much room for the exercise of favoritism and resulting inequality in the granting or withholding of transportation service or facilities as there is in the matter of compensation to be paid for such service, for, as was said by the Interstate Commerce Commission in the matter of The New England Investigation, 27 Interst. Com. Com'n. R. 560, 616, "service is often of even greater importance than the rate itself." This is especially manifest when there exists an embargo, such as the indictments in these cases allege. Hence, bearing in mind that the purpose of Congress in passing the Elkins Act was to utterly eliminate every form or kind of discrimination, favoritism, and inequality, it is quite impossible to believe that when Congress used the broad and comprehensive language which it did, "whereby any other advantage is given or discrimination

is practiced," it intended to cover only advantages or discriminations in the matter of rates or compensation for transportation service. If discrimination in rates was the only evil aimed at why were the words above quoted added? Discrimination in respect to rates had been as completely covered as the English language is capable of by the use of the words " whereby any such property shall by any device whatever be transported at a less rate," etc.

The purpose of Congress being ascertained and it being apparent that to permit discriminations in transportation service would thwart that purpose and the language used in the act being amply sufficient to embrace such discriminations, it seems to me that the conclusion is irresistible that such a discrimination as is complained of in these indictments is within the criminal provisions of the Elkins Act.

* * * * *

The allegations of the indictments forbid the possibility of drawing an inference that the discriminations or concessions which the defendants are alleged to have received were procured with the knowledge, acquiescence, or connivance of the carrier. It is defenddants' contention that such knowledge, acquiescence, or connivance is essential before the acceptance or receipt of a discrimination or concession is criminal under the Elkins Act. While it is admitted that there is nothing in the act which specifically makes the knowledge or connivance of the

> shipper an essential element of the crime, yet it is argued that the words "to give or grant" are correlative with the words "to accept or receive," and that a discrimination can not be accepted or received unless it has been given or granted. That is, of course, true; but it by no means follows therefrom that a discrimination may not have been knowingly received by the shipper and unconsciously given or granted by the carrier.

(E) OTHER SECTIONS OF INTERSTATE COMMERCE ACT NOT APPLICABLE

Section 2 (Ch. 91, 41 Stat. 479) defines and prohibits unjust discrimination on the part of the carrier. Section 3 (Ch. 104, 24 Stat. 380) prohibits undue or unreasonable preference or advantage being given by a carrier. To indict the carrier for violation of either section would throw on the Government the impossible burden of alleging and proving that the discrimination was unjust, or that the preference or advantage was undue or unreasonable.

In *Hocking Valley* v. *United States,* 210 Fed. Rep. 735, 743, Circuit Judge Denison, in affirming the order of the District Court in the case already cited, said:

> By omitting the limiting words "undue and unreasonable," in its denouncement of discrimination, the Elkins Act has avoided the contention that such a limitation was too vague to be the basis of criminal prosecu-

tions, in which, upon the same facts, one jury might acquit and another might convict.

Section 10* (Ch. 382, 25 Stat. 858) is likewise inapplicable as it relates to freight rates only and not to service (*United States* v. *Hanley*, 71 Fed. Rep. 672).

In *United States* v. *Metropolitan Lumber Co.*, 254 Fed. Rep. 335, 339, 343, District Judge Haight further said:

> By section 10 (Comp. St. 1916 § 8574) a criminal liability was imposed upon any *common carrier* who should willfully do or cause to be done, or suffer or permit to be done, "any act, matter or thing in this act

---

*"Section 10 * * *.

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

prohibited or declared to be unlawful, or who shall aid or abet therein," etc. By the same section, as amended by the Act of March 2, 1889, c. 382, § 2, 25 Stat. 855, it was made a criminal offense for a carrier "by means of false billing, false classification, false weighing or false report of weight, or by any other device or means," to knowingly and willfully assist or suffer or permit any person to obtain transportation for property "at less than the regular rates then established," on the line of transportation of such carrier. The same section, as amended by the act last mentioned, also provided that any one for whom, as "consignor or consignee," property should be carried by a common carrier, who should knowingly and willfully, "by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier," obtain or attempt to obtain transportation for such property "at less than the regular rates then established," should be guilty of a crime, as should likewise any person who should, "by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier * * * to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property."

It will thus be noted that, while the law made it unlawful and criminal for a *carrier* to give any unreasonable preference or advantage or to subject any person to an unreasonable prejudice or disadvantage in respect to transportation over its lines, and quite comprehensively prohibited and provided penalties for discrimination in the matter of compensation for transportation and from departing from the filed and published tariffs, it did not prohibit the receipt of discriminations in respect to transportation service, strictly speaking, by the shipper, nor make it criminal for him to accept transportation at a less compensation than was charged to others for a like service, or at less than the published tariffs, except when accomplished by false billing or bribery or something akin thereto, mentioned in section 10. In this condition of the law, the Elkins Act, which has been well described as " a ' catchall ' provision for any practice by either carrier or shipper which by any devise whatever would tend to defeat the purpose of the law " (*United States* v. *Vacuum Oil Co.*, 153 Fed. 604 (D. C. W. D. N. Y.) was passed.

* * * * *

Bearing in mind the purpose which Congress had in mind in enacting the Elkins Act, as before set forth, and considering, as will be hereafter shown, that a construction such as defendants urge would in many cases defeat that purpose, and further bearing in mind that one of the ways in which it

was sought to eliminate all favoritism and inequality of treatment was by visiting criminal punishment on those who would be the beneficiaries thereof, it would be unjustifiable, I think, in the absence of language from which it can be clearly found, to attribute to Congress an intention to limit the operation of the act to only such transactions as are consciously participated in by both the shipper and the carrier. Such a construction would free from criminal responsibility both the carrier and the shipper in all those cases where the shipper could, without the knowledge of the carrier, secure advantages and discriminations in transportation service, by means which do not fall within the provisions of section 10 of the Act to Regulate Commerce, as it was amended by the Act of March 2, 1889, c. 382, §2, 25 Stat. 855, and the Act of June 18, 1910, c. 309, §10, 365 Stat. 539. The provisions of that section, except as to the acts interdicted in the last paragraph, deal only with the procuring of transportation at less than the established rates. The last paragraph seems clearly to deal only with cases in which the carrier knowingly participates, or in which an attempt is made to secure the discrimination by means which would acquaint the carrier with the object sought. The language of that paragraph is:

"If any * * * person * * * shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce"

any carrier to discriminate in its favor. Under the settled rule of construction, the word " otherwise " should be construed to include offenses which are akin to those specifically mentioned; that is to say, bribery and solicitation, both of which would, of course, necessitate acquainting the carrier with the object sought to be accomplished. The use of the word "induce" would also seem to lead to the same conclusion. Hence, section 10, as amended and supplemented, would not cover cases such as these or many others which may be readily imagined. Moreover, if it was intended to cover, by section 1 of the Elkins Act, only the receipt of discriminations which are granted with the carrier's knowledge, that part of the act was quite unnecessary, because it was for all practical purposes already covered by the last paragraphs of section 10 of the Act to Regulate Commerce. It was held by the Circuit Court of Appeals of the Sixth Circuit, in *Nichols & Cox Lumber Co.* v. *United States*, 212 Fed. 588, 590, 129 C. C. A. 124, that the amendment made to that section by the Act of June 18, 1910, did not repeal the Elkins Act, because they were aimed at different evils.

(F) THE ELKINS ACT IS APPLICABLE

The Elkins Act is applicable and the facts charged constitute a violation thereof. If the facts charged are not reached by the Elkins Act, then the appellees go hence without day. It is the one or the

other. There is no other statute to which the Government may turn to reach the reprehensible acts. The Government must stand or fall on the Elkins Act.

CONCLUSION

In each case the judgment should be reversed and the cause remanded with directions to overrule the demurrer.

WILLIAM D. MITCHELL,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
WILLIAM H. BONNEVILLE,
Special Assistant to the Attorney General.

FEBRUARY, 1926.

APPENDIX A

SERVICE ORDER NO. 23

At a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 25th day of July, A. D. 1922.

It appearing, in the opinion of the Commission that an emergency which requires immediate action exists upon the lines of each and all the common carriers by railroad subject to the Interstate Commerce Act, east of the Mississippi River, including the west bank crossings thereof, and because of the inability of said common carriers properly and completely to serve the public in the transportation of essential commodities. *It is ordered and directed:*

1. That each such common carrier by railroad, to the extent that it is currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway shall give preference and priority to the movement of each of the following commodities: food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil.

2. That to the extent any such common carrier by railroad is unable under the existing interchange and car service rules to return cars to its connections promptly, it shall give preference and priority in the movement, exchange, interchange and return of empty cars intended to be used for the transportation of the commodities specially designated in paragraph numbered 1 hereof.

3. That any and all such common carriers by railroad which serve coal mines whether located upon the line or lines of any such railroad or customarily dependent upon it for car supply, herein termed coal-loading carriers, be, and they are hereby, authorized and directed whenever unable to supply all uses in full, to furnish such coal mines with open-top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange, or return of such cars; *provided,* that the phrase " suitable for the loading and transportation of coal " as used in this order shall not include or embrace flat (fixed) bottom gondola cars with sides less than 36 inches in height, inside measurement, or cars equipped with racks, or cars which, on July 1, 1922, had been definitely retired from service for the transportation of coal and stenciled or tagged for other service.

4. That all such common carriers by railroad other than coal-loading carriers, herein termed noncoal-loading carriers, be, and they are hereby, authorized and directed to deliver daily to a connecting coal-loading carrier or carriers, or to an intermediate noncoal-loading carrier, for delivery through the usual channels to a coal-loading carrier or carriers, empty coal cars up to the maximum ability of each such noncoal-loading carrier to make such deliveries and of each such connecting coal-loading carrier to receive and use the coal cars so delivered for the preferential purposes herein set forth.

5. That all such common carriers by railroad be, and they are hereby, authorized and directed to dis-

continue the use of cars suitable for the loading and transportation of coal, for the transportation of commodities other than coal, so long as any coal mine remains to be served by it with such cars; and as to each noncoal-loading carrier, so long as deliveries of any such cars to connecting carriers may be due or remain to be performed under the terms of this order.

6. That all such common carriers by railroad be, and they are hereby, authorized and directed, to place an embargo against the receipt of coal or other freight transported in open-top cars suitable for coal loading, by any consignee, and against the placement of such open-top cars for consignment to any consignee, who shall fail or refuse to unload such coal or other freight so transported in coal cars and placed for unloading, within 24 hours after such placement, until all coal or other freight so transported in coal cars and so placed has been unloaded by such consignee and shall notify the Commission of such action. This authorization and direction as to embargoes shall not interfere with the movement of coal to tidewater or the Great Lakes for transshipment by water, nor shall it apply where the failure of the consignee to unload is due directly to errors or disabilities of the railroad in delivering cars.

7. That in the supply of cars to mines upon the lines of any coal-loading carrier, such carrier is hereby authorized and directed, to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession

as may be required for the following classes of purposes, and in following order of classes, namely:

Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

Class 2. (a) For fuel for railroads and other common carriers, and for bunkering ships and vessels; (b) for public utilities which directly serve the general public under a franchise therefor, with street and interurban railways, electric power and light, gas, water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human foodstuffs; hospitals; (c) for the United States, state, county, or municipal governments, and for their hospitals, schools, and for their other public institutions—all to the end that such common carriers, public utilities, quasi-public utilities, and governments may be kept supplied with coal for current use for such purposes, but not for storage, exchange, or sale. And subject thereto:

Class 3. (As to each coal-loading carrier which reaches mines in Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee, and Alabama.) For bituminous coal consigned to any Lake Erie port for transshipment by water to ports upon Lake Superior. And subject thereto:

Class 4. (As to all such common carriers by railroad.) Commercial sizes of coal for domestic use. And subject thereto:

Class 5. Other purposes.

No coal embraced in Classes 1, 2, 3 or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed.

8. That all rules, regulations and practices of said common carriers by railroad with respect to car service as that term is defined in said act are hereby suspended so far as they conflict with the directions hereby made.

9. That this order shall be effective from and after July 26, 1922, and shall remain in force until the further order of the Commission.

10. That copies of this order be served upon the carriers hereinbefore described, and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 5.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

APPENDIX B

SERVICE ORDERS

Service Order No.	Date effective	Subject	Cancellation effective
	1920		
1	May 20	Rerouting freight to expedite movement regardless of routing instructions. Rates applicable, however, are rates in effect at date of shipment over route designated.	Dec. 21, 1920
2	May 20	Relocation of some 30,000 coal cars from western roads to eastern roads.	Automatically
3	May 20	Relocation of some 20,000 empty box cars from eastern to western roads.	June 24, 1920
4	May 28	Texas carriers directed to unload 27,000 cars of grain.....	Automatically
5	June 13	Preference and priority for pooled over nonpooled coal to Lake Erie ports for transshipment by water, en route to the Northwest.	Apr. 12, 1921
6	June 24	Tidewater coal to New England—rescinded by Service Order No. 11.	Aug. 1, 1920
7	June 21	Carriers east of Mississippi River directed to furnish preferentially coal mines with open-top cars, amended by Service Order No. 9 and superseded by Service Orders 15 and 16.	July 13, 1920
8	July 1	Coal for Philadelphia Electric Co.....	July 15, 1920
9	July 21	Amendment to Service Order No. 7 requires "coal cars" shall not include flat gondola cars with sides less than 38 inches. Superseded by Service Orders 15 and 16.	Sept. 18, 1920
10	July 26	Preference and priority in supply of cars for and in transportation of bituminous coal for Northwest.	Apr. 12, 1921
11	Aug. 2	Tidewater coal to New England. This order indefinitely suspended by amendment September 17, 1920, the New England situation apparently having been measurably relieved.	Apr. 12, 1921
12	Aug. 10	Orders discontinuance Service Order No. 9 for 90 days. Superseded by Service Orders 15 and 16.	Sept. 18, 1920
13	Aug. 24	Carriers at Galveston, Tex., authorized to remove and store grain held in cars to release equipment.	Dec. 31, 1920
14	Aug. 25	Supply and distribution of open-top cars to wagon mines. Rescinded by Service Order No. 17.	Sept. 18, 1920
15	Sept. 19	Carriers east of Mississippi River to furnish mines with open-top cars suitable for loading and transporting coal in preference to any other use, provided that such "coal cars" (which shall not include or embrace flat-bottom gondola cars with sides less than 38 inches in height, inside measurement, or cars equipped with racks, or cars which on June 20, 1920, had been definitely retired from the coal service) may be used for freight moving in direction of mines upon a road not materially out of line and to points not beyond such mines. Also that noncoal-loading carriers within such territory shall deliver daily to connecting coal-loading carriers empty or loaded coal cars to their maximum ability. (S. O. 15 and 16, superseding Nos. 7, 9, and 12.)	Oct. 14, 1920

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1920		
16	Sept. 19	All carriers east of Mississippi River authorized to furnish cars to mines for transporting coal, in addition and without regard to existing ratings and distributive shares, upon written application showing that such coal is needed solely for current use of public utilities, water and sewer works, schools, hospitals, State or municipal governments, etc. (S. O. 15 and 16, superseding Nos. 7, 9, and 12.)	Oct. 14, 1920
17	Sept. 19	Supply and distribution of open-top cars to wagon mines; ordinarily cars not to be furnished to wagon mines which customarily do not load open-top cars within 24 hours of placement.	Mar. 6, 1921
18	Oct. 1	Private cars and cars placed for railroad fuel loading to be designated as "assigned" cars. All others "unassigned" cars.	Mar. 24, 1921
19	Oct. 1	Preference and priority in transportation of coal commandeered by Navy.	
20	Oct. 15	Supersedes Service Order No. 15. Extends territory outlined in that order to eastern boundary of States of Montana, Wyoming, Colorado, and New Mexico.	Nov. 29, 1920
21	Oct. 15	Supersedes Service Order No. 16. Carriers east of Montana, Wyoming, Colorado, and New Mexico are authorized and directed to place, furnish, and assign cars to coal mines so that public utilities in that territory shall not suffer for lack of fuel.	Nov. 24, 1920
	1922		
22	July 26	Routing freight to expedite movement without regard to routing instructions. Rates applicable, however, are rates in effect at date of shipment over route designated.	Apr. 22, 1923
23	July 26	Carriers east of Mississippi River directed to give priority in movement to food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil; empty cars intended for transporting foregoing commodities; open-top cars (with sides less than 36 inches high) suitable for loading and transporting coal; that noncoal-loading carriers shall deliver daily to connecting coal-loading carriers empty coal cars to their maximum ability; that coal cars shall be used exclusively in coal trade so long as any coal mine remains to be served; that coal cars must be released within 24 hours after placement; that cars be placed for loading coal according to specific classes. Superseded by Service Order No. 25.	Sept. 20, 1922
24	Sept. 1	Carriers west of Mississippi River directed to give priority in movement to food for human consumption, feed for livestock, livestock, perishable products, fuel, etc., and empty cars intended for transporting foregoing commodities.	Dec. 11, 1922
25	Sept. 20	Supersedes Service Order No. 23. This order designates as coal-carrying cars, cars with sides 42 inches in height; permits the use under certain conditions of open-top cars for the movement of specified commodities, and eliminates the special classes of industries enumerated in Service Order No. 23 to receive coal.	Dec. 11, 1922

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1922		
26	Nov. 22	Coal for Commonwealth of Virginia	Dec. 6, 1922
27	Nov. 28	250 cars ordered placed at Elkhorn Piney Coal Manufacturing Co., at rate of 30 cars per day, account of threatened destruction of stock pile by fire.	
28	Dec. 1	Coal for Commonwealth of Virginia, 4 cars per day for 10 consecutive working days.	
29	Dec. 2	Missouri Pacific R. R. directed to place 40 cars per day for 10 consecutive days at mines in the so-called Spadra district; also 10 cars per day for 5 consecutive days, to the Bernice Mines.	
30	Dec. 12	Car supply for Shreve Run mine of James M. McIntyre & Co., 10 cars daily for 10 consecutive working days; and Kearney-Barnett mines of Jos. E. Thropp, 4 cars daily for 15 consecutive working days, to be consigned to U. S. Army.	
31	Dec. 20	Car supply for Commercial Coal Mining Co., at Twin Rocks, Pa., 3 cars daily for 15 consecutive working days, to be consigned to Government Fuel Yards, Washington.	
32	Dec. 30	Car supply for certain mines on Chesapeake & Ohio Ry. and Pennsylvania R. R. for coal consigned to Government Fuel Yards, Washington.	
	1923		
33	Jan. 6	Car supply at certain mines on West Virginia Northern, Indian Creek Valley, and Baltimore & Ohio R. R. for coal consigned to supply officer of U. S. Navy, shipments to be at rate of 5 cars daily for 27 consecutive working days.	
34	Jan. 6	Car supply at Latrobe, Pa., mines for coal consigned to U. S. Army Quartermaster, shipments to be 8 cars daily for 15 consecutive working days.	
35	Jan. 15	Car supply at certain mines on Norfolk & Western for coal consigned to U. S. Navy Yard, Portsmouth, Va., shipments to be 8 cars daily for 10 consecutive working days.	
36	Jan. 15	Car supply at certain mines on Pennsylvania R. R., Johnstown & Stony Creek R. R., for coal consigned to Government Fuel Yards, Washington, for 10 consecutive working days.	
37	Jan. 18	Controversy between Minneapolis & St. Louis R. R. and Peoria & Pekin Union Ry. over terms under which Peoria & Pekin shall interchange freight traffic between M. & St. L. and connecting carriers at and in vicinity of Peoria, Ill.	July 12, 1924
38	Feb. 9	Car supply for Montevallo Mining Co., Aldrich, Ala., for coal for domestic purposes.	Feb. 26, 1923
39	Mar. 5	Docking vessel "Maumee" at New Haven, Conn., so coal may be promptly forwarded to Springfield Gas Light Co., Springfield, Mass.	

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1924		
40	Apr. 1	Kansas City Terminal Ry. Co. required to permit Missouri-Kansas-Texas R. R. Co. to use Union passenger station and other terminal facilities at Kansas City, Mo.	
	1925		
41	Aug. 8	Missouri Pacific directed to route certain traffic via Ferriday, La., and Texas & Pacific, by reason of damage to incline at Vidalia, La.	Sept. 8, 1925
42	Dec. 4	To facilitate movement, Seaboard Air Line Ry. authorized to forward freight traffic via Brooksville & Inverness Ry. in Florida.	
43	Dec. 28	To expedite movement, carriers directed to transport freight, consigned to Florida, via most available routes without regard to routing instructions.	

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CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 216

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

THE P. KOENIG COAL COMPANY

No. 217

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

MICHIGAN PORTLAND CEMENT COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY BRIEF FOR THE PLAINTIFF IN ERROR

I

Opposing counsel argue (No. 217, Br. 27) that Service Order No. 23 prescribes "classes of purposes" and "order of classes" only with respect to car service, that the Commission had no delegated power, at the time alleged, to fix preferences and priorities in car service, and that defendant

in error did not obtain a discrimination, concession or advantage in transportation.

Opposing counsel argue (No. 217, Br. 1) that counsel for the Government have failed to refer to the point raised by paragraph 3 of the demurrer, that is to say: (No. 217, R. 40)

> (3) Service order No. 23, particularly paragraph 7 thereof, makes no rules, regulations or practices applicable to the transportation of coal for different classes of purposes and different order of classes, said order being applicable only to car service, which does not denote or connote transportation.

They argue that Service Order No. 23 " directs the carriers to give preference, and priority in *movement,* among other things, to coal, not according to any preferred uses or purposes, but generally and only as a commodity (italics ours)," and " The directions given and the restrictions attempted to be imposed by paragraph 7 relate only to car service, to the placing, furnishing and assigning of cars which are suitable for the loading and transportation of coal " (No. 217, Br. 28).

Section 402 of the Transportation Act of 1920, paragraph (15), which amended Section 1 of the Interstate Commerce Act (Ch. 91, 41 Stat. 476), provides:

> (15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requir-

ing immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d)

> (10) The term "car service" in this Act shall include the *use, control, supply, movement, distribution,* exchange, interchange, and *return* of locomotives, *cars,* and other vehicles *used in the transportation of property,* including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act (italics ours).

Section 400 of the Transportation Act of 1920, paragraph (3), which amended paragraph 1 of the Interstate Commerce Act (Ch. 91, 41 Stat. 475), provides:

> * * * The term "*transportation*" as *used in this act shall include* locomotives, *cars,* and other vehicles, vessels, *and all instrumentalities and facilities of shipment or carriage,* irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, *and handling of property transported* * * * (italics ours).

Reading the paragraphs together, they are all-comprehensive and indicate clearly the Congressional intent not to deal with *car service* and *transportation* as separate and independent subjects. There are sound reasons for this. One is that in the very nature of things transportation includes the cars. Without cars there can be no transportation. Shortage of cars means shortage of transportation. There is no inconsistency in priority in

transportation and priority in car service. Priority in transportation begins with the priority in the placement of empty cars. There could be no priority in transportation of food for human consumption, flour, for instance, if the cars that were furnished were loaded with automobiles. Another reason is that to divide the subjects would result in a senseless construction which the courts will not favor. The frail contention that *car service* and *transportation* are unrelated subjects, that the Commission may not give priority in transportation by regulating the distribution and loading of cars at the mines, falls of its own weight. The theory of opposing counsel appears to be, that the distribution and loading of the cars are separate and apart from, and have no connection with, the movement of the cars on their forward journey.

The Commission had the power to suspend the car service rules and to direct others in lieu thereof. It did so. That the cars were placed and loaded for movement and were not to remain standing may be assumed. The statute does not require that there shall be one order to place the cars and another to move them. The placement of the cars at the mines was an integral part of the transportation under the statute, and as much so as the movement thereof from West Virginia and Kentucky to Detroit.

Peoria & Pekin Union Railway v. *United States*, 263 U. S. 528, 532, is cited (No. 217, Br. 29). In that case it was held that the authority conferred upon the Commission, under the emergency clause,

to issue orders in certain cases, if it finds that an emergency exists, does not sustain an order, so issued, requiring a terminal carrier to " switch " by its own engines and over its own tracks, freight cars intended by or for another connecting carrier.

It is true that in *Peoria & Pekin Union* v. *United States*, 263 U. S. 528, 533, this Court said, " But ' car service ' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of subparagraphs *a*, *b*, and *c*."

This is far from saying that, under the statute, the Commission is without power, in emergencies, to regulate the use of *all* of the instrumentalities of transportation, regardless of ownership, under subparagraphs a, b, and c. In that case, the sole question related to " power to require the *performance* of the transportation service," and " the switching order here in question compels *performance* of the primary duty to receive and transport cars of a connecting carrier " (italics ours). That opinion does not impair the power of the Commission under sub-paragraph (a) to suspend the operation of all existing rules and was never so intended.

Moreover, the opinion in *Peoria & Pekin Union* v. *United States, supra*, makes no reference whatever to sub-paragraph (d) except the statement

that " the order can not be justified as dealing *with preferences in transportation* or embargoes under sub-paragraph (d) " (italics ours) (263 U. S. 532). Why? Because *performance* of the transportation service as between two carriers in that case is a subject very different from *priority of transportation* in the instant case. Service Order No. 23 followed (a), (b), and (d). There was no occasion to take any action under paragraph (c) which relates to joint or common use of terminals.

Defendant in error argues that power to make the order is not conferred by subdivision (d) of Paragraph (15) because " preference or priority in transportation " assumes that the cars are awaiting movement after having been distributed and loaded. That argument overlooks the broad meaning of the word " transportation " as used in Section 1, paragraphs (3) and (10) of the Interstate Commerce Act, *supra.*

In *Arlington Heights Fruit Exchange* v. *Southern Pacific Company,* 20 I. C. C. 106, 117, it was held that transportation includes the furnishing of cars (see also *United States* v. *Baltimore & Ohio R. R. Co.,* 165 Fed. Rep. 113, 121; *Swift & Company* v. *Hocking Valley Ry. Co.,* 93 Ohio State, 143, 148). It follows that authority to give directions for priority in transportation includes authority to give directions for priority in placement of cars.

The argument that Congress granted the Commission the emergency power to suspend the rules, regulations and practices in respect to car service

(which includes the use, supply, distribution and return of coal cars), and did not give the Commission the emergency power to issue in lieu thereof, priority orders for such use, supply, and distribution of coal cars, imputes to Congress a useless and senseless course and defeats the very purpose of the emergency power.

In *Baltimore & Ohio Railroad* v. *Lambert Run Coal Company*, 267 Fed. Rep. 776, the United States Circuit Court of Appeals for the Fourth Circuit (Circuit Judges Pritchard, Knapp, and Woods) held that the Commission, under sub-paragraph (d), had the emergency power to issue preference and priority orders in the distribution of cars to coal mines. In delivering the opinion Circuit Judge Woods said (267 Fed. Rep. 780):

> The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal-car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation, and unexpected needs of the public, which can not be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate

distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the commission the power to grant relief in such conditions, by providing that (quoting subparagraph (d))—

The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long-existing car shortage. But, recognizing the necessity of a degree of flexibility, the Congress conferred upon the commission power, in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings, with preference and priority to such extent as will in its opinion meet the emergency.

All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the commission when they find an emergency requiring it. Our conclusion is that the making and promulgation of rule 8 as amended was clearly within the power of the commission.

The opinion of the Circuit Court of Appeals expressed the views of the three eminent judges who concurred. The opinion is none the less persuasive because the decree was reversed on other grounds.

II

Knowing that the Elkins Act refers to the transportation of property only, and not to the carriage of passengers, opposing counsel, in referring to the illustration of the District Court, "the hobo who steals a ride on the 'bumpers' of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession 'given' him, though not knowingly," state it "is only one of many such illustrations that can be given" (No. 217, Br. 6, 7). They undertake to add illustrations with respect to the carriage of freight, e. g. "If a man, by force, seizes a railroad company's locomotive and hauls a car of freight from the company's yard to his factory, he, while guilty doubtless of a serious crime, is not violating the Elkins Act. Or if a man ships in interstate commerce intoxicating liquor to himself and then in a lonely place holds up the train and retakes possession of his property, is he to be punished under the Act?" Passing the comment of the late Chief Justice White on similar arguments at the Bar, "But these extreme suggestions have no relation to the case in hand" (206 U. S. 1, 25), attention is called to the case of *Illinois Central Railroad Co.* v. *Messina,* 240 U. S. 395, which involved the construction and application of the anti-pass provision of the Hepburn Act. By Section 1 of the Act of February 4, 1887, Ch.

104, 24 Stat. 379, as amended by the Act of June 29, 1906, Ch. 3591, 34 Stat. 584, and still in force, any common carrier violating the provisions against free transportation of persons is guilty of a misdemeanor and subject to a penalty, and any person other than those excepted " who uses any such interstate * * * free transportation " is made subject to a like penalty.

Messina sued for personal injuries suffered while upon a train running from Mississippi to Tennessee. He had paid no fare but was upon the tender, as he said, by permission of the engineer. In a wreck Messina was caught between the tender and a car and injured. The Supreme Court of Mississippi sustained the judgment which this Court reversed because the trial judge refused to instruct the jury that the engineer had no authority to permit the plaintiff to ride on the train " at the place he was in," but the request for this instruction was based upon the company's rules, not upon the Act to Regulate Commerce. The Supreme Court of Mississippi discussed the act of Congress but held that it did not apply to the case. In reversing the judgment, this Court, speaking through Mr. Justice Holmes, said (240 U. S. 397):

> The word " such " like " said " seems to us to indicate no more than that free transportation had been mentioned before. We can not think that if a prominent merchant or official should board a train and by assumption and an air of importance should obtain

> free carriage he would escape the Act. We are of opinion therefore that the Act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal.

The principle announced in the *Messina Case* is precisely the principle which we seek to maintain here. It was held that the Judge should have instructed the jury that the engineer had no authority to permit Messina to ride on the tender in view of the antipass provision. In that case, this Court has sanctioned the principle that it is not necessary for the company and the passenger or shipper to cooperate to bring about a violation of the statute.

III

Opposing counsel, in referring to the opinion of this Court in *Missouri, Kansas & Texas Railway* v. *Harriman,* 227 U. S. 657, 671, states that the reference to the Elkins Act " was not made in view of any relevant contention," and " the dictum of Justice Lurton did not deal with a material or even litigated point and was not intended as a deliberative statutory construction " (No. 216, Br. 25, 26). Opposing counsel also argue that the case " was a civil case and the excerpt quoted therefrom appears

to be an inadvertence in reference by the Court" (No. 217, Br. 24). But an examination of that case will disclose that this point was argued (227 U. S. 662) and the language of Mr. Justice Lurton was not *dictum* but was squarely within the issues drawn by the parties.

Counsel further say that the quotation from the Government's brief stopped short of the last sentence of the paragraph, which is "We see no ground upon which this contract can be held upon its face to have offended against the statute." But the *statute* to which Mr. Justice Lurton in that sentence referred was the Carmack Amendment and not the Elkins Act at all.

Two pages earlier he made a similar reference to the Carmack Amendment, "Nor is there anything upon the face of this contract, when read in connection with the rate sheets referred to therein, * * * which offends against the provisions of the twentieth section of the act of June 29, 1906." The shipper had placed a low value on certain very valuable "show cattle" in order to gain the advantage of the lower rate and signed a contract accordingly. The cattle were loaded by the shipper and were never seen by the company's agent, nor was it claimed that he was ever informed of the value or quality of the cattle to be shipped. By a negligent derailment the cattle were killed and the plaintiff recovered their full value, $10,640, in the

State court. From beginning to end, the plaintiff claimed that the contract which he had so executed was "a contract of exemption forbidden by the Hepburn Act of June 29, 1906, being the Carmack Amendment of the twentieth section of the general act to regulate commerce of February 4, 1887, Ch. 104, 24 Stat. 379" (227 U. S. 667, 668). That was the statute to which Mr. Justice Lurton referred in the sentence above quoted.

Defendants in error cannot escape or argue away (No. 216, Br. 25, No. 217, Br. 24) this Court's opinion in *Missouri, Kansas & Texas Railway* v. *Harriman, supra.* Speaking through Mr. Justice Lurton, this court meant exactly what it said, i.e. (p. 671):

> If he (the shipper) knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708).

In the Harriman case there was no unlawful act on the part of the carrier because its agent had neither seen the particular cattle shipped, nor been informed of their value or quality. The undervaluation of the cattle by the shipper for the purpose of obtaining a lower rate was the seeking and the obtaining of an advantage by the shipper. Under the clearly stated facts in that opinion Justice Lurton held, (1), that the contract of carriage,

which set out the maximum value of the cattle and the rate applicable for the transportation of cattle of that maximum value, did not offend against the Carmack Amendment to section 20 of the Interstate Commerce Act; and, (2), that a shipper who knowingly declares an undervaluation of the property for the purpose of obtaining the lower of two published rates (dependent upon the valuation of the property) thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act, and this even when the carrier is not informed of the value of the property.

IV

Opposing counsel maintain (No. 217, Br. 15) that the second "whereby clause," namely, "or whereby any other advantage is given or discrimination is practiced," does not refer to the first "whereby clause," namely, "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs * * *." But the second "whereby clause" must be read in connection with the first "whereby clause" as well as in connection with the prohibition against rebates, concessions, or discriminations. The "device" is not restricted to rebates. A device used in obtaining a concession is also prohibited, and such is the interpretation given by District Judge Hazel in *United States* v. *Vacuum Oil Co.*, 153 Fed. Rep. 598, 604:

> The word *"concession"* does not appear in the earlier acts to regulate commerce, but is used for the first time in section 1 of the Elkins Act, which is apparently a "catch-all" provision for any practice by either carrier or shipper which *by any device whatever* would tend to defeat the purpose of the law (italics ours).

To the same effect, where unlawful *discriminations* were received in the placement of coal cars at mines during a coal car shortage, *by a device,* and where rebates were not involved, see *Dye* v. *United States,* 4th C. C. A., 262 Fed. Rep. 6, 7.

Although opposing counsel argue (No. 217, Br. 8–15) that the Elkins Act is applicable and effective only when a published tariff is violated, it should be noted that not one case has been cited to substantiate that proposition. The broader interpretation given the Elkins Act by the courts is well illustrated in *Vandalia Ry. Co.* v. *United States,* 226 Fed. Rep. 713, where a loan by a carrier to shipping interests at less than the market rate was held to be an unlawful concession. In *C. C. C. & St. L. Ry.* v. *Hirsch,* 204 Fed. Rep. 849, and in *Central of Georgia* v. *Blount,* 238 Fed. Rep. 292, leases of property by carriers to shippers at inadequate rentals were held to be such unlawful concessions. In *Northern Central Railway* v. *United States,* 241 Fed. Rep. 25, the waiving of royalties for the use of coal lands leased to shipping interests was held to be such an unlawful concession. In *Pennsyl-*

vania Railroad v. *Puritan Coal Co.*, 237 U. S. 121, and *Pennsylvania Railroad* v. *Stineman Coal Co.*, 242 U. S. 298, this court held that where a carrier has promulgated rules for the distribution of coal cars to shippers and it departs from those rules to the prejudice of one or more shippers the carrier has practiced unlawful discrimination. That the Elkins Act makes unlawful the granting of discriminations by any device when coal car distribution rules promulgated by the Commission are violated, and where no tariffs are concerned, see *Dye* v. *United States*, 262 Fed. Rep. 6.

Opposing counsel (No. 216, Br. 19) quotes from the concurring opinion of Circuit Judge Baker in *Standard Oil Company of Indiana* v. *United States*, 164 Fed. Rep. 376 (7th C. C. A.). But the point here involved was not raised or passed upon in that case and Judge Baker's remarks were not directed to it. The point discussed by Judge Baker was whether the defendant in that case could *knowingly* receive a concession when it had no knowledge of the lawful rate; whether it intended to receive a concession and thereby violate the law when it was ignorant of the legal rate. The language of Judge Baker, quoted by opposing counsel, immediately followed his statement in support of the proposition that the shipper could not properly be convicted unless it "either actually knew that it was accepting and receiving

a concession or wilfully and intentionally ignored facts and circumstances known to it which would have led to such knowledge." That proposition has no relevancy whatever to the contention of the defendant here under consideration.

District Judge Mayer's opinion in *United States* v. *Lehigh Valley Railway Co.*, 254 Fed. Rep. 332, cited by opposing counsel (No. 216, Br. 22), does not hold that an agreement between carrier and shipper is necessary before a violation of the Elkins Act occurs. The indictment alleged, in substance, that the railroad had not collected certain accrued and proper demurrage charges and that the shipper had not paid them. The court did not hold that there could be no concession within the meaning of the Elkins Act in the absence of an agreement or understanding between carrier and shipper.

The statute under which Service Order No. 23 was issued did not require the Commission to file it as a tariff. If the Commission had authority to issue such an order, then Service Order No. 23 had the force and effect of law. Rules and regulations promulgated by a Department of the Government under the legislative authority have the force of law and the violations may be punishable. *United States* v. *Grimaud*, 220 U. S. 506, *Avent* v. *U. S.*, 266 U. S. 127, 131. It was stated by this Court in

Pennsylvania R. R. Co. v. *International Coal Co.*, 230 U. S. 184, 197:

> The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike.

Cited with approval in *Swift & Co.* v. *Hocking Valley Railway*, 93 Ohio State, 143, 148.

V

The Emergency Coal Act (Sept. 22, 1922, 42 Stat. 1025) (No. 216, Br. 26; No. 217, Br. 32) was aimed at profiteers and was enacted, *inter alia*, for the purpose, as stated in section 2 thereof, and in Senate Report No. 895, 67th Congress, 2nd Session, "to prevent upon the part of any person, partnership, association, or corporation, the purchase or sale of coal or other fuel *at prices unjustly or unreasonably high*" (italics ours). There were some overlapping provisions as between the Emergency Coal Act and section 1 of the Interstate Commerce Act. Both statutes authorized the Commission to issue orders for priorities in *embargoes*. Because the Emergency Coal Act vested power in the Commission to issue priority orders in embargoes is no argument that the Commission did not already have that power. The penalty provision in the Emergency Coal Act likewise overlapped the penalty provisions in the Elkins Act.

VI

In each case the judgment should be reversed and the cause remanded with directions to overrule the demurrer.

WILLIAM D. MITCHELL,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
WILLIAM H. BONNEVILLE,
Special Assistant to the Attorney General.

MARCH, 1926.

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CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 216

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

THE P. KOENIG COAL COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE DEFENDANT IN ERROR

STATEMENT

The demurrer in this case placed in issue the construction of the Elkins Act, the construction of the emergency legislation authorizing Service Order No. 23 of the Interstate Commerce Commission, and var-

ious constitutional points. The decision of the court below sustaining the demurrer was limited to the first ground therein presented. As is stated in the opinion (page 54):

> "For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer."

The decision upon this appeal if in favor of the appellant is decisive only of the first ground urged in the demurrer, the construction of the Elkins Act; if the decision below is affirmed and the construction of the Elkins Act as made by the learned District Judge is deemed correct, there can be no occasion to consider the other points urged.

We assume generally that under these circumstances the only point at issue before this court is that upon which the decision below depended.

ARGUMENT

SUMMARY

I. The receipt of a concession or discrimination whereby an advantage is given or discrimination is practiced, necessarily involves the grant of a concession or the practice of a discrimination by the carrier, the existence of which acts by the carrier the indictment negatives. The question is primarily the meaning of the statutory language. The common and lexical meanings thereof exclude those for which the Government contends, and they confirm the construction made by the court below. That this is correct is corroborated by the Committee Report and the Congressional Debate.

II. The Government seeks a strained and novel construction not contemplated in those important cases in which the Elkin Act was enforced. (*New York, New Haven & Hartford v. Commission*, 200 U. S. 361; *Armour Packing Co. v. United States*, 209 U. S. 56; *Lehigh Coal & Navigation Co. v. United States*, 250 U. S. 556; *United States v. Union Stockyards*, 226 U. S. 286; *Standard Oil Co. of Ind. v. United States*, 164 Fed. 376; *North Central Railway Co. v. United States*, 241 Fed. 25.) Section 10 of the Act to Regulate Commerce defines in clear language the offense of fraud upon the carriers, and if it were the intention to include similar acts within the scope of the Elkins Act, it would have been simple and easy to use apt language thereto.

III. The learned District Judge correctly considered *United States v. Metropolitan Lumber Company*, 254 Fed. 335 to have been wrongfully decided.

IV. The gist of the offense here charged is a fraud upon the carriers and a violation of Service Order No. 23. It would have been competent for Congress to make violations of the Commission's rules a crime (*Avent v. United States*, 266 U. S. 127). Whatever omissions there may be in the penal sections of Section 402, Transportation Act of 1920, or in the Emergency Coal Act (Sept. 22, 1922, 42 Stat. 1025) cannot authorize this court to assume legislative functions and to apply the Elkins Act beyond the scope indicated by its language. The appeal to the sense of moral opprobrium to induce such action is not a legal argument and merits neither consideration nor response.

I.

THE RECEIPT OF A CONCESSION OR DISCRIMINATION WHEREBY AN ADVANTAGE IS GIVEN OR DISCRIMINATION IS PRACTICED NECESSARILY INVOLVES THE GRANT OF A CONCESSION OR THE PRACTICE OF A DISCRIMINATION BY THE CARRIER.

(a) The issue is the meaning of "concession or discrimination."

It is almost unnecessary to allude to the fact that a criminal statute cannot be given a construction which departs from the fair and ordinary meaning of its language. Unusual and speculative meanings are

not favored. Doubtful intendments are excluded, and only fair, plain and unforced meanings are included.

The statute deals with rebates, concessions or discriminations (a) Whereby property is transported in interstate commerce at a less rate than that named in the published tariffs; and (b) Whereby any other advantage is given or discrimination is practiced. The statute itself, by these two "whereby" clauses, so defines the words "rebate," "concession" and "discrimination" that we have considered it impossible for reasonable minds to disagree. But nevertheless that clear and obvious interpretation which Judge Tuttle has made, that to receive a concession whereby an advantage is given, or to receive a discrimination whereby a discrimination is practiced means to receive a special favor granted or practiced by the carrier, is disputed in this appeal. The consession spoken of in the statute is a grant or a boon given by the carrier, and the discrimination included therein is one which the carrier practices. The generic meaning of "concession" and discrimination" involves the voluntary departure from an accepted standard and the voluntary practice of favoritism by the carrier.

While it is not necessary to our argument that this court should hold that the word "concession" refers to a rate-cut, we think this is the true meaning of that word in carrier parlance. And we suggest that discrimination by the carrier in respect to service is included within the word, "discrimination." A "rebate" means, of course, the repayment of money. "Concession" refers to a price concession; and "discrimination" means preferential treatment by the carrier in respect to service. The elements of offense outlined by the statute all revolve about the central fact that the danger which is being guarded against

is that the carrier should make discrimination among shippers and should practice favoritism.

By the loose use of language counsel for the United States have attempted to use the word, "concession" to apply to what was not granted. They insist upon using this word to designate a resultant situation no matter how it came about, when in fact "concession" has the necessary connotation that it be the result of a favoring or granting mind.

It is a misuse of language to designate the shipments charged in the indictment as "a concession obtained by fraud" for the very point in issue is whether they were concessions or discriminations in any event. We may well concede that a concession does not change character merely because a fraud induced it. If a carrier grants me a rate-cut not allowed by the published tariffs because I fraudulently represent that I am a corporation of tremendous shipping business, the receipt by me thereof would be the receipt of what the carrier gave me—a concession in its very origin. The government's statement of the question misapprehends the essential issue, that the carrier must create the concession or practice the discrimination. The issue is merely the meaning of these words. The learned District Judge clearly apprehended this issue and in the argument below he propounded to the Government's counsel the following:

> "It will be helpful to me in the preparation of my opinion in this cause if you will kindly indicate to me the position of the Government as to the following questions:
>
> "1. What is the meaning of each of the following words, as used in the section of the Elkins Act here involved: (a) 'Concession';

(b) 'Discrimination'; (c) 'given'; (d) 'practiced'; (e) 'received'; (f) 'accept'?

"2. Do the words, 'given' and 'practiced,' as used in said section, mean respectively, (a) 'given by such carrier,' and (b) 'practiced by such carrier'?

"3. In what respects, if at all, is the following statement on page six of the brief of the defendant herein incorrect: 'In other words, if a person steals the transportation of a package, as would take place when the hobo transports his belongings on the rods, or when a person transports one commodity under a false billing, he would, according to the theory of the prosecution, be getting a concession'?

"4. Does the Government contend (a) that the decision in the case of *Missouri, Kansas & Texas Railway Company v. Harriman,* 227 U. S. 657, cited on page seven of its brief herein, is controlling authority in the present case and (b) that the language quoted from said cited decision on said page seven is not dictum?

"5. Do the acts of defendant charged in the indictment herein constitute the acceptance or receiving of a 'discrimination,' as distinguished from a 'concession'?

"6. If so, could defendant be convicted thereof under such indictment, which charges only the acceptance and receiving of a concession'?"

Government's Replies

1 and 2. The word "concession" as used in the Elkins Act implies a comparison with, a measurement by, and a departure from, a determined standard. (**Standard Oil Co. of Ind. v. United States**, 164 Fed. 376, 390.) In the case of concessions relating to the compensation of the carrier, the standard is the published tariff established in accordance with Section 6 of the Interstate Commerce Act. In the case of concessions in transportation service, the standard may be a car distribution rule, as in the **Puritan** case (237 U. S. 121) and the **Dye** case (262 Fed. 6 criminal); an embargo, as in the **Metropolitan Lbr. Co.** case (254 Fed. 336); or other rule, **Puritan** case. In the case at bar the standard is the service order of the Interstate Commerce Commission, which fixed the amount of transportation service to which all shippers were entitled.

A discrimination under the Elkins Act may relate to the compensation of the carrier, as where one shipper obtains a lower rate for a given transportation service than other shippers, or it may relate to any matter in connection with the receipt, transportation, or delivery of property or any service in connection therewith, and comes about where one shipper fares better at the hands of the carrier than another under like circumstances. (**C. & A. Ry. v. Kirby**, 225 U. S.

Defendant's Replies

(1) **"Concession."** This word is best defined by the language of the statute in which it is used. It is (a) A grant of an allowance from the published tariffs; (b) a grant of an advantageous favor (i. e., whereby an advantage is given).

"Discrimination." The practice of favoritism toward one, a limited number or a class, implying the withholding of such favors from the remaining;

"Give." To confer by voluntary act something upon or unto another.

"Practice." "Practiced" is defined in Webster's New International Dictionary as follows: "To do, perform, carry on, act, or exercise; now, except rarely, to do or perform often, customarily, or habitually; to make a practice of; to put into practice or action; to execute; as to **practice** gaming."

We add the following: To indulge in a use; to perform as a matter of conduct; to devote onesself to a certain conduct (usually of sinister connotation, i. e., to practice prostitution; to practice sabotage; to practice defamation; to practice discrimination).

"Receive," "Accept." In this connection we refer the Court to Webster's New International Dictionary under definition of the word "Take," at the synonyms therein set forth as follows: Take; Receive, Accept; **Take**, the general

155; **Penna. R. R. v. Puritan Coal Co.**, 237 U. S. 121; **Metro Lbr. Co. case, supra; Dye v. United States**, 262 Fed. 6.)

"Given" means given by the carrier and "practiced" means practiced by the carrier. But the words of the statute making it unlawful for any person "to offer, grant, or give or to solicit, accept or receive, any rebate, concession, or discrimination * * * whereby etc.," must be read in connection with the next succeeding sentence of the statute as follows:

"Every person or corporation, whether carrier or shipper, who shall, **knowingly**, offer, grant, or give, or solicit, accept, or receive any such rebate, concession or discrimination, shall be deemed guilty of a misdemeanor, * * *."

The word "knowingly" which we have underscored is important to a proper interpretation of the statute. Unless the carrier grants the concession knowingly it has not violated the statute. The same is true as to the receiving of the concession by the shipper. Manifestly the shipper cannot accept or receive a concession or discrimination from a carrier unless it is granted by the carrier, but it may be granted without knowledge on the part of the carrier of its character as a concession or discrimination. If so, the carrier can not be prosecuted. But if the concession is accepted and received by the shipper knowingly he is indictable and punword may not imply a tender or offer of that which is taken; to **Receive** is to take something which is offered or presented; to **Accept** is to receive with assent or approval, or in the spirit or under the terms of the offer.

(2) The words "given" and "practice," it is conceded by the Government, mean given by such carrier and practiced by such carrier. It is impossible as a matter of statutory construction to fail to give effect to these words. In fact they do only redundantly elaborate upon the meaning of the words "concession" and "discrimination," and they resolve any doubt or ambiguity concerning those words.

ishable, and the fact that the concession which the shipper knowingly accepts is granted by the carrier without the necessary knowledge does not operate as a bar to the prosecution of the shipper. This is fully developed in our reply brief and is, we think, amply supported by the cases cited therein.

3. If a person steals the transportation of a package or other property, i. e., if he knowingly obtains the transportation of property at less than the rates named in the tariffs, he violates the Elkins Act. The "hobo" example is not a good one for at least two reasons: (1) Because the Elkins Act does not apply to the transportation of persons, but only "in respect to the transportation of property"; (2) the stealing of the transportation of the package "on the rods" would not be obtaining a concession whereby the property is transported "at a less rate than that named in the tariffs published and filed" by the carrier because the carriers do not publish any rates for the transportation of packages in the hands of hobos "on the rods."

(3) The statements referred to in this question are incorrect but absolutely consistent with the theory of the prosecution. The hobo who transports his belongings upon the rods is not excluded from the operation of the Elkins Act because of his character as a hobo or because of the character of his belongings. The Elkins Act applies to the transportation of any property in interstate or foreign commerce. If the railroad consented that he should transport goods upon the rods there can be no question but that he is receiving the benefit of a discriminatory practice. Other shippers of goods must pay the transportation charges. But the theory of the Government is that a person receives a concession if he obtains an advantage in the transportation of property even though the advantage is not given to him by the carrier and the carrier has not conferred it upon him by a discriminatory practice. To be consistent, therefore, they must necessarily admit that the hobo so transporting his belongings, as stated in the

question, in interstate commerce, etc., becomes amenable to the penalties of the Elkins Act. Somehow they cannot face the verities of this proposition. The example illustrates, in fact, that the Elkins Act was not intended to apply to things other than rebates, concessions or discriminations which by force of these words and by force of the words "whereby an advantage is given or a discrimination is practiced," are things given as a result of intendment on the part of the carrier. The false billing case must, if the theory of the prosecution is not abandoned, constitute a violation of the Elkins Act. It does not, and the Government correctly takes the position that it does not. In the hobo case both the advantage which the hobo was receiving and also the fact of transportation at all were unknown to the carrier. In the false billing case the fact of transportation is known to the carrier but the fact of advantage is unknown to the carrier. There is no distinction in principle with reference to the Elkins Act in the two examples but the cases were mentioned, the first broad enough to cover unwitting transportation as well as unwitting advantage; the second example being limited to unwitting advantage. The second example in principle is absolutely indistinguishable from the instant case and the only thing that excludes it from the scope of the Elkins Act is the fact

that it cannot be said that a concession has been granted or that a discrimination has been practiced. The Government correctly states that the offense of obtaining a less rate than the published rate by reason of false billing or by any other device, whether with or without the consent and connivance of the carrier, is penalized by Section 10 of the Interstate Commerce Act. This section deals with acts closely relating in character to the act charged in this indictment. But the penalties are limited and to cases of obtaining advantageous rates.

4. The government does not urge that the decision in **Mo. Kans. & Tex. Ry. v. Harriman,** 227 U. S. 657, 671, an excerpt from which is quoted on page 7 of our original brief, is controlling authority in the present case. The court there held that the specific contract for transportation of cattle, which contract was in compliance with the lawful tariff rates, was not illegal under the Carmack amendment of Section 20 of the Act to regulate commerce. Although the language quoted may be regarded as dictum we think that the reasoning of Justice Lurton is sound, is in point in the instant case, and is persuasive.

(4) This question is sufficiently answered.

5 and 6. The acts of the defendant charged in the indictment constitute the acceptance and receipt of a concession whereby an advan-

(5) A strict construction of the meaning of the word "concession" limits it to obtaining a rate allowance. We have not insisted that

tage was given and a discrimination was practiced in favor of the defendant and against others. The indictment so charges; see paragraph 2 and 4 thereof. The language of the statute upon which we rely is: "* * * it shall be unlawful for any * * * corporation * * * to accept, or receive any * * * concession * * * in respect to the transportation of any property in interstate * * * commerce * * * whereby any * * * advantage is given or discrimination is practiced."

Concessions and discriminations are closely related. Where there are competing shippers if one received a concession from the determined standard and the other competing shippers do not receive such a concession, a discrimination results. The same act may therefore constitute a concession and a discrimination.

this was a necessary construction for the reason that we felt able to bring still stronger arguments to bear. It might with propriety be held that the word "concession" is limited to rate advantages, and other advantages are included in the term "discrimination." It is clear, however, that taking the words together they will include advantages both of rate and of service. If an indictment should set up in detail all of the elements, let us say, of the crime of murder, but should neglect to use the word "murder," we are inclined to think that such an indictment would nevertheless be sufficient to charge that offense. So too, if this indictment sets up all of the elements necessary specifying the acts and the intent to constitute the acceptance or receipt of a discrimination, we are inclined to think that it is not fatal that the pleader does not say that the acts done as aforesaid constitute a discrimination. In short we are inclined to think that an error not having a misleading effect in what is really a conclusion of the pleader, is not fatal to an indictment. For example, if a man were accused of an assault and all of the facts and intent constituting the assault were clearly set up but the pleader added that he thereby committed the offense of assault and battery, we think that sufficient notice of the offense is given

by the statement of the acts and intent which do in fact constitute it, and that his designation of the name of the offense is in the nature of a conclusion and is defective in form rather than in substance unless it should be found to have the effect of misleading the defendant. Although it may be true that we are too liberal in making this concession, still we think it but right to set forth the results of our thought on the matter regardless of the advantage to us.

(6) We have already indicated above our views as to the requirements in an indictment. The defect suggested we regard as a defect of form which by force of Revised Statutes No. 1025 cannot be relied upon unless it tends to the prejudice of the defendant.

(b) Committee report and history confirm the construction made by the court below.

We print as an appendix hereto the applicable Committee Report at the time of the passage of the Elkins Act. We have italicized such portions of the Report as have a bearing upon the construction of the Elkins Act.

As was stated by the chairman, "We conceive it to be the desire of Congress to absolutely prevent, it possible, the granting of discriminations in the way of railroad rates to favored shippers. This is by many claimed to be the greatest abuse of the day * * *. Your Committeee believes that the legislation proposed by the Elkins Bill together with the present

Interstate Commerce Law, covers about all the ways that thought or language can devise or describe to prevent the granting of discriminations in favor of one shipper as against another, or the building up of one concern through the favoritism of railroad corporations."

Because it was said by Chief Justice White in *Standard Oil Co. v. United States,* 221 U. S. 1:

> Although debates may not be used as a means for interpreting a statute, that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted,

And because these debates have so frequently been utilized by this court in its opinions, we digest here the substance of what was said in the House of Representatives concerning the purpose of the Act as shown by Volume 36, page 2141, f. f. of the Congressional Record:

> Mr. Dalzell: "In as much as this is merely one phase of the anti-trust regulations that have been so thoroughly debated, it is not thought advisable that there should be any protracted debate."
>
> Mr. Underwood: "I am in favor of the Elkins Bill. That Bill provides for the punishment of railroad or other transportation companies that give rebates to certain corporations. I believe that the granting of such rebates by our great transportation companies is one means of fostering the trusts, and therefore I favor the Elkins Bill, as far as it goes, but it does not go far enough."

Mr. Cannon: "In my own judgment, if regulation can be enacted and enforced that will dissolve a *real or alleged co-partnership between the great shippers and the common carriers,* so that each citizen engaged in interstate commerce can get the same rates that a man does who is a larger shipper, I believe that would be the great thing to do." (Applause on the Republican side).

Mr. Overstreet: (Stating that three things —in anti-trust legislation were sought to be accomplished) "The third proposition was the effort against discriminatory practices in rebates existing between great shippers and carriers."

Mr. Dalzell: "As the gentleman from Indiana has well said, we have already enacted into law two-thirds of the anticipated trust legislation (and we should) complete the legislation proposed for the control of trusts."

Mr. Hepburn: (Page 2158) "What they (referring to the Interstate Commerce Commission and others favoring this legislation) have objected to is the discrimination as to commodity, discrimination as to place, discrimination as to persons—mainly as to persons—in the rebates that are paid. Under the present law the man who pays the rebates—in the corporation, the individual who pays—is the one who is criminally responsible. The man who solicits, who persuades, who tempts this traffic, that man is not held responsible; but the only one held responsible is he who could or would testify. Now under this law it is made criminal to solicit or to receive equally with the offer of the gift. This is wise and in my humble judgment it will stop discriminations; and if we stop discriminations, then clearly the major portion of the evils complained of cease to exist."

Manifestly collusion with the carrier to build up one's business at the expense of competitors is a different thing entirely from an act in which the carrier is not sought to be involved in any arrangement.

(c) Usage in judicial expression and carrier parlance confirms the interpretation.

As we read the extensive citation of cases in the government's brief, they but illustrate those definitions and purposes which we urge. We cannot claim decisive significance here for those which (not involving analogous facts and being limited to instance of carrier misconduct) stress those very interpretations which we here insist shall not be abandoned.

In *New York, New Haven & Hartford v. Commission,* 200 U. S. 361, an injunction was sought to prevent the carrier from rate cutting by the device of itself dealing in and transporting commodities, with the result that proceeds would not equal cost and published freight rates. The decision expresses, consistently with our own views and those of the learned District Judge herein, that the purpose of the Elkins Act and the Act to Regulate Commerce "was to make the prohibition applicable to every method of dealing *by a carrier* by which the forbidden result (rate-cutting) could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was the purpose? It was to compel the carrier as a public agent to give equal treatment to all."

Armour Packing Company v. United States, 209 U. S. 56, represents an application of the Elkins Act to the situation for which it was enacted and for which

we here argue. The language quoted in the government's brief is more applicable in ours. The carriers had given a rate concession to the packers, and from the facts it was knowingly received. But the shipper claimed an honest belief that the Elkins Act did not apply. The exposition of the scope of the law in the *Armour* case, from which the Government's contention gains no support and our own receives a degree of confirmation, of course, did not exhaust definition. *Lehigh Coal & Navigation Company v. United States,* 250 U. S. 556.

United States v. Union Stockyard, 226 U. S. 286, represents a proper application of the statute and serves to define its scope as we contend. The shipper received a bonus from the carrier for erecting a plant on the carrier's lines. This is a *rebate* on anticipated shipping. The court correctly defines the scope of the statute as being to prevent favoritism.

United States v. Vacuum Oil Co. 153 Fed. 598, represents a proper application of the law to a concession from the published tariffs which in fact was not discriminatory. It is this case which uses the language "catch-all" so much relied upon. We think it obvious that a "catch-all" for *rate concessions* is not a "catch-all" for acts of a different and distinct nature not included within the just meaning of "concession."

Vandalia Railway v. United States, 226 Fed. 713, thus indicated the scope of the Elkins Act:

> Per Mack, Circuit Judge:
>
> The history of this legislation demonstrates that both discriminations and rebates have ever been sought to be hidden under the most

> subtle disguises. Every device that seeks to cover up either a rebate or a discrimination in interstate transportation is denounced by the statute—"

Citations of this character can be multiplied, but these concededly correct applications and definitions of the law, though indeed sounding favorable to our argument, were not made in view of facts as here presented.

But it is significant that since its enactment in 1903, save for the single example of *Metropolitan Lumber Co. v. United States*, the act found application only to prevent and to penalize favoritism of carriers and acts af shippers inducing these practices.

The best and most careful exposition of the meaning of the word "concession" which we have been able to find is contained in the opinion of the Circuit Court of Appeals, 7th Circuit, in the case of *Standard Oil Co. of Indiana v. United States, 164 Fed. 376,* and we refer particularly to Circuit Judge Baker's concurring opinion, page 390, in which it is reasoned as follows:

> The purpose of all canons of interpretation is to discover and effectuate the will of the lawmakers; and the primary rule, to which all others are subsidiary, is to read the text according to the ordinary rules of grammar and composition, and to take the words in their usual meanings. For the carrier, "to offer" or the shipper "to solicit" involves the knowing and consenting mind. No common, no lexical, no technical definition to the contrary can be found. To say "to offer knowingly," "to solicit knowingly," is the veriest tautology. Likewise "to grant" or "to accept" requires the conscious and understanding act of the intellect and will. If one does not know what he

is about, his alleged grant is no grant. If one does not know the scope and nature of his act, his alleged acceptance is no acceptance. Does any ambiguity arise because the words "to give" and "to receive" are also used? "To offer" and "to solicit" characterize the inchoate act. The completed act that is condemned is for the carrier "to grant or give" and the shipper "to accept or receive." Ordinary and accepted meanings of "give" and "receive" are synonymous with those of "grant" and "accept." As all those words appear in the same phrase of the same sentence, the principle of *ejusdem generis* forbids their being taken to indicate acts of antagonistic quality. Further the emphasis herein given to the verbs is doubled when regard is extended to the nouns, "rebate, concession, or discrimination." Each of these nouns in and of itself implies a comparison with, a measurement by, and a departure from, a determined standard. Congress did not say (but, if it had, an argument might well be made that negligence in not learning published rates was to constitute a crime):

"The shipper whose property shall be transported in interstate or foreign commerce at a less rate than that named in the published and filed tariffs shall be subject to a fine."

But Congress only said:

"The shipper who shall solicit, accept or receive a rebate, concession or discrimination in respect of the transportation of his property in interstate or foreign commerce shall be subject to a fine."

But even if by lexicon and grammar "to receive a concession" could fairly be given the meaning "to come into the possession of a concession without knowledge or consent," an auxiliary canon of construction would pre-

> vent that choice of meanings. That canon is that unless no other way is open a penal act will not be sustained and administered on the theory that it was "cunningly and darkly penned," so as to entrap a merely negligent citizen within the meshes of a criminal prosecution. To couple in the same breath and under the same punishment such vitally different acts as the wilful violation of the legally established equality between shippers and the unintentional failure to ascertain a published rate would constitute a trap unparalleled, so far as I have learned, in the annals of legislation."

While this case was pending the applicable portion of the Elkins Act was amended and the word "knowingly" was inserted. The receipt of a concession involved a conscious act according to the decision; and hence the word "knowingly" did not in any degree change the law.

In that case "concession" is defined as follows:

> The "concession" differs from the "rebate" only in this, that in the "concession" the shipper, instead of paying the full rate and receiving back part, merely settles for the difference. The result is the same—the property is transported for the same net amount less than the lawful rate.

In so far as "concession" may be applied to anything other than was therein defined, it has exactly the same scope and meaning as "discrimination." It is therefore essential that the carrier practice discrimination; and to gloss over the situation presented by the indictment characterizing it as the "receiving of a concession or discrimination whereby an

advantage is given or discrimination is practiced," is to do violence to the plain meaning of language and to fail to call things by their proper names. As the learned District Judge said:

> To say, under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion, to do violence to the plain meaning of language and to fail to call things by their proper names.

That necessary element of consciousness on the part of the carrier to deserve the characterization of "concession" was lacking in the indictment in *United States v. Lehigh Valley Railway Co.* 254 Fed. 332. There it was held by Circuit Judge Mayer that the unlawful failure of the carrier to collect demurrer charges did not make out a case of concession or discrimination, and that the unlawful failure of shippers to pay demurrage charges did not make out a case of receiving a concession or discrimination. What was missing in the indictment was sufficient allegation of intent to supply the necessary mental elements attending the use of the words "concession" or "discrimination." If the carrier were charged with the failure to collect demurrage charges with the intent that the shipper should not at any time be called upon to pay these charges, the carrier would at least stand charged with having offered a concession. And if the shipper were charged with having knowledge of the carrier's intentions that it should not pay, and with the failure to pay by reason of an intent to ac-

cept the concession so offered, the shipper would stand properly charged with receiving a concession. To offer a concession does not imply a prior agreement between shipper and carrier, but it is an overture toward such an agreement. To receive the concession is nothing other than to accept the benefits of the offer.

In *North Central Railway Company v. United States,* 241 Fed. 25, the defendant, was charged with granting a concession by failing to collect certain royalties due it. It was deemed essential that such failure to constitute a concession must have been undertaken by the carrier for that purpose.

"Whether it was such a device, and whether the purpose was to give a concession or discrimination which resulted in shipping the coal to its destination at a less rate than that mentioned in the tariff was for the jury to determine. * * * If the arrangement made with the Mining Company constituted a device for effecting a reduction in rates, or for giving an advantage to the shipper, and was so intended, the defendant was guilty of a violation of the statute."

(d) The Government seeks a strained and novel interpretation which, if intended by the act, would have been expressed in clear language.

The legislative authority at the time of the enactment of the Elkins Act and subsequently thereto had before it acts of the class in the case at bar and had in clear language interdicted that type of action where it was adopted to obtain a lower rate. Section 10 of the Act to Regulate Commerce as amended by the Act of March 2, 1889 and June 18, 1910. (Acts Feb.

4, 1887, c. 104, § 10, 24 Stat. 382; March 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549).

As if to distinguish the possibilities and varieties of conduct here indicted from those covered by the Elkins Act and involving grants of the carrier, it was therein provided that "any person * * * who shall * * * by false billing, false classification * * * or by any other device or means whether with or without the consent or connivance of the carrier * * * obtain transportation for such property at less than the regular rates then established * * * shall be guilty of fraud" etc.

Here a fraud is called a fraud—not a concession or discrimination. The indictment at bar is for fraud. It was easy to define this offense of obtaining a rate advantage by fraud upon the carrier. The very distinction between this statute and the Elkins Act is that the primary aim here is, as respects shippers, to define *advantages fraudulently obtained without the connivance of the carrier, without concession granted or discrimination practiced. Nichols & Cox Lumber Co. v. United States,* 212 Fed. 588.

To prohibit the acts charged in the indictment at bar, the statute should use clear language. That such a purpose can be easily and clearly expressed is evidenced in Section 10.

(e) The learned District Judge correctly refused to follow United States v. Metropolitan Lumber Co.

The first occasion to ask any court for the construction of the Elkins Act contended for by the Government is exemplified in *United States v. Metro-*

politan Lumber Co., 254 Fed. 335. The shipper, by means of a fraud practiced on the carrier had violated the Service Order. As stated in *Avent v. United States*, 266 U. S. 127, Congress may make violations of the Commission's rules a crime. Because such legislation was not applicable to the shipper in that case, resort was had to the Elkins Act for the purpose of obtaining a conviction for nothing other than the violation of the Service Order, certainly not contemplated by the Elkins Act.

District Judge Haight's reasoning depends entirely upon the fact that he discovers no other statute which will fit the case, and that the Elkins Act is a "catch-all." Because Section 10 is inadequate, he argues that the Elkins Act is applicable.

The reference to the Elkins Act contained in *Missouri, Kansas & Texas Railway v. Harriman*, 227 U. S. 657, 671 was not made in view of any relevant contention. There this court held valid a contract with the carrier limiting liability to the valuation declared by the shipper. The quotation (page 32, Government's brief) stops short of the last sentence of the paragraph.

> We see no ground upon which this contract can be held upon its face to have offended against the statute.

We think that Justice Lurton's language was addressed to the validity of the contract limiting liability, and he concludes that the contract involved no unlawful act of the carrier. Clearly the decision does not depend upon whether or not the shipper violated the Elkins Act. Under the law then existing he could not recover more than the declared valuation. The use of this language was probably suggested by *Chi-*

cago & Alton Railway v. Kirby, 225 U. S. 155, a case in which the carrier did in fact contract to practice discrimination and to render a special expeditious service.

The plaintiff was denied recovery for the failure of the carrier to keep this illegal agreement. We observe that undervaluation did not then necessarily seek an advantage, since it limited liability. Where as under the Cummins Amendment (March 4, 1915, c. 176, 38 Stat. 1196, 1197) undervaluation is not effective as a limitation of liability, fraudulent undervaluation violates Section 10 of the Act to Regulate Commerce. But this is beside the point. The dictum of Justice Lurton did not deal with a material or even litigated point and was not intended as a deliberative statutory construction.

II.

NON-APPLICABILITY OF OTHER STATUTES IS NOT A LEGAL ARGUMENT

That other statutes do not apply cannot influence the construction of the Elkins Act. Nor do we consider that the obvious attempt to arouse moral opprobrium merits our attention. They are not legal arguments, and should be addressed to the legislative authority.

In this connection it is of some significance that Congress by the Emergency Coal Act (Sept. 22, 1922, 42 Stat. 1025), enlarged the powers of the Interstate Commerce Commission conferred by Sec. 402, Transportation Act of 1920 (41 Stat. 476), under which

authority Service Order 23 was promulgated. There a penalty was enacted against shippers who violate the Commission's rules. Such is the offense here charged, and such is the legislation necessary properly to define as an offense what is here charged. There can be no policy stronger than that which demands adherence to the meaning of language.

CONCLUSION

THE DECISION BELOW IS CORRECT

The learned District Judge carefully considered every element affecting the interpretation of the Elkins Act, and every argument advanced by the Government. We believe his decision and opinion correctly defines the scope of the Elkins Act. We submit that it should not be reversed.

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and
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